Nos. 66, 67

# In the Supreme Court of the United States

OCTOBER TERM, 1944

THE WALLACE CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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[illegible] CLOTHESPIN & DISH WORKERS' UNION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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[illegible]IEF FOR THE NATIONAL LABOR RELATIONS BOARD

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statute involved | 3 |
| Statement | 4 |
| Summary of argument | 14 |
| Argument: | |
| Introduction | 16 |
| I. The Board did not abuse its administrative discretion in considering and basing findings of unfair labor practices upon petitioner's entire course of conduct, both before and after the settlement agreements and certification of the Independent | 19 |
| II. The closed-shop agreement was invalid under Section 8 (3) of the Act because petitioner entered into and gave effect to the terms of the agreement when it knew that the Independent intended to refuse membership to employees because they had previously engaged in activities in behalf of the Union | 33 |
| A. The proviso to Section 8 (3) does not countenance an encroachment upon the basic rights the statute guarantees to employees | 35 |
| The purpose of the Act | 42 |
| The legislative history | 44 |
| Understanding as to the meaning of the closed-shop | 55 |
| Court decisions | 59 |
| Conclusions | 63 |
| B. Petitioner violated Section 8 (3) of the Act in executing the closed-shop agreement and in discharging employees pursuant thereto | 69 |
| III. Petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act | 72 |
| Since petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) of the Act, the closed-shop agreement was invalid | 76 |
| Conclusion | 78 |
| Appendix A | 79 |
| Appendix B | 86 |
| Appendix C | 117 |

## CITATIONS

Cases: Page

*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 ..... 30
*American News Company, Inc., Matter of*, 55 N. L. R. B. 1302 ..... 64
*American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680 ..... 71
*Arbitration between Ford Motor Company and UAW (CIO), In re*, 14 L. R. R. 219 ..... 66, 115
*Bethlehem-Alameda Shipyard, Inc., and Bethlehem Steel Company, Shipbuilding Division, Alameda Yard, Matter of*, 53 N. L. R. B. 999 ..... 67
*Brotherhood of Railway and Steamship Clerks et al.* v. *United Transport Service Employees of America*, 137 F. (2d) 817, reversed, 320 U. S. 715 ..... 60
*Brown* v. *Spofford*, 95 U. S. 474 ..... 27
*Cameron* v. *International Alliance, etc.*, 118 N. J. Eq. 11 ..... 38, 64
*Canyon Corp.* v. *National Labor Relations Board*, 128 F. (2d) 953 ..... 23
*Carpenter's & Joiners Union of America, et al.* v. *Ritter's Cafe et al.*, 315 U. S. 722 ..... 65
*Case Co., J. I.* v. *National Labor Relations Board*, 321 U. S. 332 ..... 60, 65, 71
*Chicago Casket Co., Matter of*, 21 N. L. R. B. 235 ..... 22
*City of Columbus* v. *Mercantile Trust and Deposit Co. of Baltimore*, 218 U. S. 645 ..... 26
*City of Memphis* v. *Brown*, 20 Wall. 289 ..... 27
*Corn Products Refining Co., Matter of*, 22 N. L. R. B. 824 ..... 22
*Eliza Lines, The*, 199 U. S. 119 ..... 26
*Farmers' Loan and Trust Co.* v. *Galesburg*, 133 U. S. 156 ..... 26
*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 ..... 29
*First National Bank of Arkansas City* v. *Leech*, 94 Fed. 310 ..... 27
*Fore River Shipbuilding Co.* v. *Southern Pacific Co.*, 219 Fed. 387 ..... 26
*Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. (2d) 588 ..... 76
*General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Southern Pacific Co.* v. *Southern Pacific Co.*, 320 U. S. 338 ..... 61
*General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323 ..... 61
*Gotchaux Sugars, Inc., Matter of*, 12 N. L. R. B. 568 ..... 22
*Halff, Harry A., Matter of*, 16 N. L. R. B. 667 ..... 22
*Heinz, H. J. Co.* v. *National Labor Relations Board*, 311 U. S. 514 ..... 74, 76

Cases—Continued. Page

*Houde Engineering Corp., Matter of*, 1 N. L. R. B. (old) 35 ... 52, 53
*Humble Oil and Refining Co., In re*, 15 W. L. R. 380 ... 65
*International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72 ... 40, 69, 74, 76, 77, 78
*Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. (2d) 949 ... 29
*The Joy*, 290 Fed. 407 ... 27
*Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 ... 72
*Kauffman* v. *Raeder*, 108 Fed. 171, certiorari denied, 191 U. S. 567 ... 26
*Knutson* v. *Metallic Slab Form Co.*, 128 F. (2d) 408 ... 26
*Lamborn* v. *National Bank of Commerce*, 276 U. S. 469 ... 26
*Larus & Brother Company, Inc., Matter of*, 5 R-1413, 5 R-1437 ... 68
*Locomotive Finished Material Co., Matter of*, 52 N. L. R. B. 922 ... 22
*Los Angeles Steel Casting Co., In re*, 4 W. L. R. 214 ... 66
*Louisville & Nashville R. R. Co.* v. *Mottley*, 213 U. S. 467 ... 30
*Magnolia Petroleum Co.* v. *National Labor Relations Board*, 115 F. (2d) 1007 ... 23
*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, certiorari denied, 313 U. S. 565 ... 50, 71
*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678 ... 60, 65
*Monsieur Henry Wines, Ltd., Matter of*, 44 N. L. R. B. 1310 ... 41, 52, 68
*National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469, certiorari denied, 318 U. S. 774 ... 76
*National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, affirmed 309 U. S. 629 ... 35, 74
*National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. (2d) 379 ... 60
*National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678 ... 76
*National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933 ... 76
*National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685 ... 42, 59, 69, 77, 78
*National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 ... 64
*National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306 ... 23
*National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94 ... 74, 75
*National Labor Relations Board* v. *Gluck Brewing Co.*, decided August 7, 1944 (C. C. A. 8) ... 37, 71
*National Labor Relations Board* v. *Hawk & Buck Co.*, 120 F. (2d) 903 ... 23

Cases—Continued. Page

*National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528 ..... 30, 36, 60, 71
*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ..... 43
*National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609 ..... 43
*National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584 ..... 76
*National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128 ..... 74
*National Labor Relations Board* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780 ..... 76
*National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 ..... 40
*National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304 ..... 23, 24
*National Labor Relations Board* v. *Prettyman*, 117 F. (2d) 786 ..... 23
*National Labor Relations Board* v. *Rath Packing Co.*, 115 F. (2d) 217 ..... 43
*National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. (2d) 919 ..... 72
*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332 ..... 64
*National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667 ..... 76
*National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50 ..... 75
*National Labor Relations Board* v. *Standard Oil Co.*, 142 F. (2d) 676, enforcing with modifications 47 N. L. R. B. 517, petition for certiorari pending, No. 204, this Term ..... 23
*National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465 ..... 30, 36, 72
*National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, certiorari denied, 317 U. S. 649 ..... 23
*National Labor Relations Board* v. *Sun Shipbuilding and Dry Dock Co.*, 135 F. (2d) 15 ..... 23
*National Labor Relations Board* v. *Swift & Co.*, 127 F. (2d) 30 ..... 23
*National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. (2d) 63 ..... 23
*National Labor Relations Board* v. *Waumbec Mills, Inc.*, 114 F. (2d) 226 ..... 43
*National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350 ..... 65, 71
*New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 547 ..... 74
*New York Life Insurance Co.* v. *Vigias*, 297 U. S. 672 ..... 26
*Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 ..... 70
*Norrington* v. *Wright*, 115 U. S. 188 ..... 26

Cases—Continued. Page

*Omnia Co.* v. *United States*, 261 U. S. 502 ..... 70
*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 ..... 55
*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 ..... 40, 43, 64, 65
*Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646 ..... 26
*Pittsburgh Plate Glass Co.* v. *National Labor Relations Board* 313 U. S. 146 ..... 43, 65
*Pullman Standard Car Manufacturing Co., In re*, 10 W. L. R. 400 ..... 66
*Roehm* v. *Horst*, 178 U. S. 1 ..... 26
*Rutland Court Owners, Inc., Matter of*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040 ..... 41
*Shengandoah-Dives Mining Co., Matter of*, 11 N. L. R. B. 885 ..... 22
*Shubert* v. *Rosenberger*, 204 Fed. 934 ..... 27
*South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, certiorari denied, 313 U. S. 582 ..... 37
*Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31 ..... 64
*Sperry Gyroscope Co., Inc.* v. *National Labor Relations Board*, 129 F. (2d) 922 ..... 23
*Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. (2d) 629 ..... 35
*Switchmen's Union of North America, et al.* v. *National Labor Relations Board*, 320 U. S. 297 ..... 61
*Sylvania Industrial Corp.* v. *Lilienfeld's Estate*, 132 F. (2d) 887 ..... 26
*Tennessee, Coal, Iron and R. R. Co., In re*, 15 W. L. R. 15 ..... 66
*Thornhill* v. *Alabama*, 310 U. S. 88 ..... 65
*U. S. Bedding Company, Matter of*, 52 N. L. R. B. 382 ..... 68
*United States* v. *City and County of San Francisco*, 310 U. S. 16 ..... 23, 70
*United States* v. *Dickson*, 15 Pet. 141 ..... 42
*United States* v. *McElvain*, 272 U. S. 633 ..... 42
*United States* v. *Scharton*, 285 U. S. 518 ..... 42
*Untermyer* v. *Bowers*, 79 F. (2d) 9 ..... 27
*Utah Copper Co.* v. *National Labor Relations Board*, 139 F. (2) 788, certiorari denied, 64 S. Ct. 946, *sub nom Independent Ass'n of Mill Workers* v. *National Labor Relations Board* ..... 23
*Utah Power & Light Co.* v. *United States*, 243 U. S. 389 ..... 23
*Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533 ..... 43
*Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, certiorari denied, 314 U. S. 674 ..... 23, 72
*Wickwire Brothers, Matter of*, 16 N. L. R. B. 316 ..... 22
*Woods, S. A., Machine Co., In re*, 2 W. L. R. 159 ..... 66

Statutes: Page

National Industrial Recovery Act (48 Stat. 195), Sec. 7 (a) ..... 45

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq*):

Sec. 1 ..... 21, 42, 79

Sec. 7 ..... 80

Sec. 8 ..... 35, 38, 39, 40, 45

Sec. 9 ..... 40, 47, 48, 55, 63, 81

Sec. 10 ..... 19, 43, 61, 82

Railway Labor Act, 44 Stat. 577, 48 Stat. 1185 ..... 60, 61

Congressional Material:

79 Cong. Rec.:

7571, 7671–7673, 9686–9687 ..... 49

7571–9691 ..... 50

7650 ..... 48

Hearings, House Committee on Labor, 74th Cong., 1st sess., on H. R. 6288 ..... 49

Hearings, Senate Committee on Education and Labor, 73d Cong., 2d sess., on S. 2926 ..... 49, 55

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H. Rep. No. 1147, 74th Cong., 1st sess. ..... 45, 46, 48, 49, 50, 51, 52

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Fourth Annual Report (1939), pp. 19–22 ..... 21
Fifth Annual Report (1940), pp. 14, 16–18, 20, 26 ..... 21
Sixth Annual Report (1941), pp. 14–15, 25, 26, 27, 29 ..... 21
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Vol. 3, Secs. 813, 831, 841 ..... 25
Vol. 6, Sec. 1759 ..... 70
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# In the Supreme Court of the United States

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Nos. 66, 67

THE WALLACE CORPORATION, PETITIONER,

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NATIONAL LABOR RELATIONS BOARD

RICHWOOD CLOTHESPIN & DISH WORKERS' UNION, PETITIONER,

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court below (R. 345–352) is reported at 141 F. (2d) 87. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–31) are reported at 50 N. L. R. B. 138.

## JURISDICTION

The decrees of the court below were entered on February 3, 1944 (R. 352, 371). Petitions for rehearing filed by The Wallace Corporation (herein called petitioner) and by Richwood Clothespin & Dish Workers' Union (herein called the Independent) were denied on March 13, 1944 (R. 353-356, 371-375). The petitions for writs of certiorari were filed April 24, 1944, and were granted May 29, 1944 (R. 376). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTIONS PRESENTED

Petitioner, the Union,[1] and the Independent entered into agreements with the Board's approval purporting to settle a labor dispute, including a strike, and charges filed with the Board by the Union alleging, *inter alia*, that petitioner had dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act. As the result of a consent election held pursuant to the settlement agreements, the Independent was certified as the bargaining representative of petitioner's employees. Thereafter, petitioner entered into a closed-shop con-

[1] Local Union No. 129, United Construction Workers Organizing Committee, affiliated with the C. I. O.

tract with the Independent with knowledge that the Independent intended to use such a contract so that it could, by refusing membership to certain employees because of their prior activities in behalf of the Union, eliminate them from petitioner's employ. Petitioner then, acting pursuant to the closed-shop contract, discharged employees who had been refused membership in the Independent because of their previous adherence to the Union. The questions are:

1. Whether in the circumstances presented the Board in a subsequent unfair labor practice proceeding abused its administrative discretion in considering, and finding unfair labor practices based on, petitioner's entire course of conduct both before and after the settlement agreements and the certification of the Independent.

2. Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8 (3) and (1) of the Act.

3. Whether the Board's finding that petitioner dominated, interfered with and supported the Independent in violation of Section 8 (2) and (1) of the Act is supported by substantial evidence.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 79–85.

## STATEMENT

Upon the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 1–31).[2]

The facts as found by the Board and shown by the evidence, may be summarized as follows:[3]

Petitioner is engaged in the manufacture of clothespins and other wood products at Richwood, West Virginia (R. 67). From the time the Union in July 1941 began to organize petitioner's employees, petitioner engaged in a counter-campaign of opposition. On the day the Union held its initial meeting Foreman McIlwee (R. 147) told a group of employees that M. B. Wallace, Jr., petitioner's president, had declared that he would close the plant and move it away rather than recognize the C. I. O. union. Foreman McIlwee urged the employees to attend the scheduled meeting and to oppose organization of petitioner's employees into the Union (R. 6–7; 164–166). On another occasion Foreman McIlwee warned employee Dodrill, one of the most active supporters of the Union and subsequently its president (R. 147, 150–151, 162), that employees who joined the Union would lose their jobs if Dodrill did not

[2] The Board issued its decision and order on June 7, 1943 (R. 1). Previously, the Board had vacated an earlier decision and order issued on February 27, 1943, and had heard reargument of the case on May 13, 1943 (R. 5).

[3] References preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

"quit agitating union and getting signers" (R. 7: 148, 164–165). Soon after Dodrill began his organizing activities he was questioned by Foreman Gibson about his union activities and was warned that President Wallace had declared that he "would never recognize the C. I. O." (R. 7; 147–148, 162–163). Foreman Harry White cautioned Dodrill that if he "did go ahead and organize * * * Wallace would not recognize the union that we would all be out of a job, he would shut the plant down and move it away * * *" (R. 7–8; 148–149, 166–167). Foreman White on other occasions told employee Griffie, who was an active union member, that "the C. I. O. would never operate in that plant" and that Mr. Wallace had so stated to Plant Manager Davis (R. 8; 74–76, 83–86). Similarly, Foreman Sleeth addressed anti-union remarks to Dodrill's wife, also an employee, and predicted that "the ones that did not sign up with the C. I. O. didn't have anything to worry about, that the company would see that they was taken care of" (R. 8; 117–119).

Early in September 1941 the Union asked petitioner for recognition as the bargaining representative of its employees (R. 9; 76). Petitioner, although challenging the Union's majority claim, refused the latter's offer to have its membership application cards checked against petitioner's payroll unless petitioner's plant manager were given an opportunity to question each employee individually with respect to his designation of the

Union (R. 9; 149–150, 154–155, 196–197). When the Union rejected this proposal, Plant Manager Davis suggested the holding of a Board election. The Union agreed, on condition that petitioner reinstate Dodrill, who had been discharged by petitioner in August (R. 9–10; 145, 150–151, 155–156, 198). Plant Manager Davis rejected this proposal on the ground that Dodrill "was too much of a union agitator" (R. 10; 151, 198). On September 25 the Union called a strike and established a picket line at the plant, which was shut down the same day (R. 10; 76, 151, 198).

With the advent of the strike petitioner launched the Independent. A group of employees arranged to meet at the home of Foreman Gibson on the night of October 2 for the purpose of forming an organization (R. 10–11; 76–77, 89–93, 135–137). On the appointed night Foreman Gibson met the group on the street and adjourned the meeting to the home of his assistant, Lundy Groves (*id.*), explaining that, "I can't have it at my house, there is too many C. I. O. members" (R. 90). Groves worked under Gibson and acted as foreman in Gibson's place when the latter was absent from the plant (R. 11–12; 78–79, 87–88, 96–97, 133–134, 208–210, 245). The Independent was organized at the meeting in the Groves' home. The organization was assisted by B. E. Thompson, a local newspaper editor, who was recommended to the group as an adviser by Irene Weese (R. 11–12; 89–94, 100–102, 116, 232–233, 237), petitioner's

paymaster and confidential secretary to Plant Manager Davis (R. 10; 217–218, 227–228). Thompson became the Independent's business manager (R. 100–102), but leadership among the employee participants in the organization was assumed by Groves, together with Reese and Smith, supervisory employees who held positions of responsibility with petitioner similar to Groves' (R. 11–12, 20; 95–96, 119–120, 126–131, 140–145, 153–154, 173–176, 186–187, 206–207, 210–216). All three men attended the initial organizing meeting of October 2, at Groves' home (R. 92–93), and all three became members of the Independent's bargaining committee which conducted negotiations with petitioner (R. 10–11; 55, 199–200). Both Groves and Reese were members of the board of directors of that organization (R. 20; 103), and Reese was its president at the time it first requested recognition by petitioner (R. 11; 199). Groves also solicited for the Independent during the strike (R. 13; 77–78).

On October 10, 1941, the Union filed charges with the Board, alleging, *inter alia*, that petitioner had violated Section 8 (2) of the Act by sponsoring the formation of the Independent (R. 12; 312–313).[1] On October 14, the Independent requested

[1] The charges also alleged that petitioner had discharged Harvey Dodrill because of his activities on behalf of the Union and had otherwise opposed the Union's organizing campaign, in violation of Section 8 (1) and (3) of the Act (R. 312).

recognition by petitioner as bargaining representative of the employees (R. 12; 199). On October 31, the Independent filed with the Board a petition for investigation and certification of representatives of petitioner's employees (R. 12–13; 292–293).

During the ensuing two and one-half months, representatives of petitioner, the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition (R. 13–14; 151–152, 157–159, 200–202, 271–275, 286, 293–296). Meanwhile the Independent's membership drive proceeded, coupled with a company-sponsored back-to-work movement. Petitioner mailed post cards to employees and sent foremen to their homes soliciting their return to work (R. 13; 97–98, 124–126, 180–183, 202–203, 311). Foreman Gibson, during this period, told a subordinate employee that he had "orders to go around and ask all the girls to go back to work. * * * the plant is going to open at 2 o'clock and if you don't come back you are off the pay roll" (R. 13; 97–98). Foreman White, after soliciting an employee to return to work, told her that the plant "will never run under the C. I. O." (R. 13; 124–125, 180–181). Assistant Foreman Lundy Groves, while soliciting one employee to join the Independent, declared, according to the latter's testimony, that "that was the

only way we was ever a-going to get back to work up there, if we ever got this thing settled we would have to settle it in that way" (R. 13; 77–78).

Between January 13 and 19, 1942, petitioner, the Independent, and the Union entered into agreements providing for termination of the strike, immediate resumption of operations at the plant, and an election to be conducted by the Board to determine whether either of the two unions represented a majority of petitioner's employees (R. 14–15; 53–59). The agreement provided further that if either union won the election, petitioner would enter into a "union shop" contract with it (R. 15; 55).[5] Finally, the election agreement provided for settlement and withdrawal of the Union's pending charges, in consideration of petitioner's promise not to dominate or interfere with the Independent or otherwise to interfere with its employees' rights under the Act (R. 15; 53–54).[6] At the election, held on January

[5] For the purposes of this case the parties have made no distinction between the terms "union shop" and "closed-shop." The provision in the settlement agreement referred to reads as follows (R. 55):

> "The Company further agrees that if either Union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

[6] In effecting the settlement, three documents were executed. The first, dated January 13, was signed by represent-

30, the Independent received a majority of the votes cast, and on February 4 it was certified by the Board's Regional Director as the exclusive collective bargaining representative of petitioner's employees (R. 18; 60).

Following the election petitioner and the Independent entered into bargaining negotiations. On February 28, the latter wrote to petitioner demanding a closed-shop contract as a necessary means of preserving its small majority against possible dissipation at the hands of those employees who preferred the Union (R. 18; 287–289). The letter stated that, since the election, petitioner had hired several new employees who "are favorable to the interests of our opponents", and that "if other similar-minded employees are given jobs in your plant, it won't be long until our majority of 15 will be either jeopardized or overcome." Declaring that the Independent in-

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atives of petitioner and of the two unions (R. 54–55). It provided that the strike would be terminated and operations resumed pending an election to be conducted by the Board, that petitioner and both unions would refrain from all forms of coercion and intimidation of employees, and contained the "union shop" provision referred to above (*id.*). The other two documents, dated January 19, were signed by representatives of the parties and approved by the Board's Regional Director (R. 54, 59). They provided for the holding of the election, withdrawal of the Union's charges, the reinstatement of Dodrill, and that petitioner would refrain from interfering with or coercing its employees or dominating the Independent (R. 53–54, 56–59).

Of the 186 valid votes cast the Independent received 98, the Union 83, and 5 votes were cast for neither (R. 60).

tended to use the proposed closed-shop agreement, not to require all employees to become members, but rather to remove from the plant employees who, prior to the election, had exercised their rights under the Act by participating in the Union's organizing campaign, the letter stated (R. 18; 288–289, italics added):

> The "Closed Shop" will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because *those who are so unfavorable will not be permitted to become members of our organization* and, without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have.

On March 7, petitioner and the Independent executed a 2-year contract which provided that all present and future employees eligible for membership in the Independent "shall become members" within 10 days from the date of the contract or from date of hiring (R. 19; 61–66). On the same day a copy of the contract was posted in the plant (R. 19; 218–219). Thereafter, be-

tween March 7 and 18, 31 of the petitioner's employees who applied for membership in the Independent were rejected because of their past adherence to the Union (R. 19, 21–24; 82–83, 99, 152–153, 38). On March 16, petitioner posted a notice in its plant that, pursuant to the contract, only members in good standing in the Independent would be permitted to continue in petitioner's employ on and after March 18 (R. 19; 218, 291–292), and on the latter date it excluded from its plant and dismissed the 31 employees who had been rejected by the Independent, together with 12 other employees, former members of the Union, who had not applied for membership in the Independent (R. 19; 98–100, 152–153, 38).

Upon these facts the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act (R. 27). The Board considered the effect of the settlement agreements, the consent election, and the certification of the Independent, and, in the exercise of its administrative discretion, determined that in view of the circumstances under which the closed-shop contract was executed, the purposes of the statute would be effectuated by considering petitioner's entire course of conduct, both before and after the settlement agreements and the certification (R. 21–22, 23–24). The Board concluded that the proviso to Section 8 (3) of the Act did not justify petitioner's conduct in entering into the closed-shop

agreement when it knew that the Independent intended to refuse membership to, and thus cause the discharge of, employees because of their previous adherence to the Union. The Board accordingly found that the closed-shop agreement was invalid and that petitioner's discharge of 43 employees pursuant thereto was discriminatory and in violation of Section 8 (3) and (1) of the Act (R. 21–24). Reviewing petitioner's conduct in its entirety, both before and after the settlement agreements, the Board also concluded that the Independent had been dominated in violation of Section 8 (2) and (1) of the Act (R. 19–21, 24, 27). Accordingly, the Board ordered petitioner to cease and desist from its violations of the Act, to cease and desist from giving effect to any contract between it and the Independent, to withdraw recognition from and disestablish the Independent as representative of any of its employees for collective bargaining purposes, to offer reinstatement with back pay to the 43 employees discriminated against, and to post appropriate notices (R. 28–36).

Thereafter petitioner and the Independent filed, in the court below, petitions to review and set aside the Board's order (R. 323–337, 358–368), and the Board filed its request that the order be enforced (R. 338–343, 369–370). On February 3, 1944, the court handed down its opinion and entered its decree enforcing the Board's order (R. 345–352, 371).

## SUMMARY OF ARGUMENT

I. The Board did not abuse its administrative discretion in considering petitioner's entire course of conduct both before and after the settlement agreements and the certification of the Independent. Plainly, nothing in the settlement agreements or the certification of the Independent precluded the Board from inquiring into whether unfair labor practices had been committed subsequent to the certification of the Independent. As to unfair labor practices prior to the settlement agreements, it is within the Board's administrative discretion to go behind a previously approved settlement agreement, certification, or other means of adjusting a labor dispute, where the Board finds that such means of adjustment have ceased to serve the intended purpose of effectuating the policies of the Act. In view of the unlawful conduct of petitioner and the questionable conduct of the Independent, with respect to the making and giving effect to the terms of the closed-shop contract, the Board reasonably determined that the purposes of the Act would be effectively served if the Board considered the entire relationship between the two, both prior and subsequent to the settlement agreements and the certification. Furthermore, the settlement was in express terms conditioned upon petitioner's future compliance with the Act. Petitioner's subsequent violation of the law, in breach of the settlement, cleared the path for the Board to consider the entire controversy.

II. The Board properly found that the closed-shop agreement was invalid under Section 8 (3) of the Act for the reason that petitioner entered into and gave effect to the terms of the agreement when it knew that the Independent intended to refuse membership to employees because they had previously engaged in activities in behalf of the Union. The minority employees in the case at bar were denied membership in the Independent and were discharged by petitioner because they had exercised their right under the Act to engage in activities in support of the Union. The proviso to Section 8 (3) of the Act, which prescribes the narrow limits within which a closed-shop contract may be consummated, construed, as it must be, in the light of the policy and provisions of the Act as a whole, does not countenance an encroachment upon the basic rights the statute guarantees to employees. The language of the Act, its broad purpose, its legislative history, the opinions of experts in the labor relations field as to the true function of the closed-shop, and decisions of the courts, support the Board's view that Congress did not intend the closed-shop proviso to permit an employer and the bargaining representative selected by the majority of his employees in a proper unit to override the statutory right of individuals or minority groups of employees to engage in concerted activities. To allow an employer and the exclusive representative of his employees to discriminate against the minority

employees under the guise of a closed-shop agreement would be contrary to the policies of the Act and to public policy generally. The fact that petitioner had contracted, as part of the settlement agreement prior to the election, to enter into a closed-shop contract with whichever union won the election, cannot operate to defeat the purposes of the statute.

III. The Board's finding that petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act is supported by substantial evidence, as the court below held. Following a period of open opposition on the part of petitioner to the Union's attempts to organize its employees, and to bargain with petitioner in their behalf, the Union called a strike. The Independent was organized and officered by petitioner's supervisory employees during the course of the strike to compete with the Union as a candidate for the employees' choice as their bargaining representative.

## ARGUMENT

### INTRODUCTION

The Board and the court below found that petitioner, by its conduct both before and after the settlement agreements and certification of the Independent, violated the Act (R. 21, 23–24, 348–351). Certain provisions of the Board's order are based primarily on unfair labor practices antedating the settlement agreements and can be

sustained only if the Board acted properly in going behind the settlement and certification. These are the provisions of the order, based on the finding that petitioner dominated the Independent, which require petitioner to cease and desist from dominating, interfering with, and contributing support to the Independent, to cease and desist from recognizing it and to take the affirmative action of withdrawing recognition (R. 28–29). The Board expressly rested its power to find that petitioner dominated the Independent on its determination that it could properly consider events occurring prior to the settlement (R. 21–24, 25–26), and the court below in sustaining this finding upheld the Board's power to go behind such agreements (R. 348–351).

The remaining provisions of the Board's order are based on events which occurred subsequent to the settlement and certification and can be sustained irrespective of whether the Board could go behind such settlement and certification.[5] These provisions of the order are based on the finding that petitioner violated the Act by entering into, and discharging employees pursuant to, the

[5] Of course, nothing in the settlement agreements or the certification of the Independent licensed petitioner to commit subsequent unfair labor practices or the Independent to benefit from such practices. We discuss a different point—the claimed bearing of the settlement agreements and the certification upon the question whether such subsequent unfair labor practices were in fact committed—under Point II, *infra*, pp. 69–70.

closed-shop contract and require petitioner to cease and desist from giving effect to the contract with the Independent, from encouraging membership therein, and from in any other manner interfering with, restraining and coercing its employees, and to take the affirmative action of offering reinstatement with back pay to the 43 employees discharged and of posting appropriate notices (R. 28–29). It is to be noted, furthermore, that if the Board had the right to consider the presettlement events, those provisions are valid irrespective of the issues raised as to the events occurring subsequent to the settlement, because the contract was made with a company-dominated union. The Board pointed out that its finding respecting company-domination supported its setting aside of the contract (R. 25–26), and the court below expressly held as an alternate basis for its decision that the conduct of the petitioner and Independent subsequent to the settlement and certification was so "high-handed" that, irrespective of whether it constituted an unfair labor practice, the Board properly considered the earlier events and these in turn sustained the full order (R. 348–349, 350–352).

Since the order can be sustained *in toto* only if the Board is not estopped by agreement or otherwise from resting its decision upon all the facts in the case, we shall discuss under Point I (pp. 19–32, *infra*), the effect of settlement agreements and certifications. Under Point II (pp. 33–72,

*infra*), we shall argue that petitioner's conduct in entering into, and discharging the 43 employees pursuant to, the closed-shop contract violated Section 8 (3) and (1) of the Act, irrespective of whether the Independent was an employer-dominated organization. Under Point III (pp. 72–78, *infra*) we shall show that petitioner dominated the Independent in violation of Section 8 (2) and (1) of the Act.

## I

### THE BOARD DID NOT ABUSE ITS ADMINISTRATIVE DISCRETION IN CONSIDERING AND BASING FINDINGS OF UNFAIR LABOR PRACTICES UPON PETITIONER'S ENTIRE COURSE OF CONDUCT BOTH BEFORE AND AFTER THE SETTLEMENT AGREEMENTS AND CERTIFICATION OF THE INDEPENDENT, AND FINDING THAT PETITIONER THEREBY COMMITTED UNFAIR LABOR PRACTICES

Nothing in the National Labor Relations Act prevents the Board from disregarding a settlement agreement or a certification when it deems such action in harmony with the purposes of the statute.* The Board found that petitioner had continued to violate the statute, subsequent to the settlement agreements and the certification, and deemed itself justified in basing its determination

* Section 10 (a) of the Act provides that the Board's power "to prevent any person from engaging in any unfair labor practice" by means of the formal procedure set out in Section 10, "shall be exclusive, and *shall not be affected by any other means of adjustment* or prevention that has been or may be established by agreement, code, law, or otherwise" (italics supplied).

of unfair labor practices upon petitioner's entire course of conduct, including events antedating the settlement. The Board's position in this respect can be supported on two grounds: (a) that under general principles of administrative law it is proper for the Board in carrying out the purposes of the Act to disregard an agreement designed to settle prior charges when the unfair labor practices continue, and (b) that here the settlement agreements themselves were conditioned upon petitioner's future compliance with the Act, so that the agreements became inoperative as a settlement when further violations of the Act occurred.

A. The Board's experience has led it to make extentive use of the amicable adjustment of disputes as a substitute for formal action. In many cases the Board can more effectively enforce the policies of the Act by settling charges of unfair labor practices, upon agreement of the parties, than it can by proceeding formally against the employer. In such cases the Board concludes that the time saved in settling the controversy quickly, the public expense avoided, and the reasonable assurance of substantial compliance with the purposes of the statute, compensate for accepting less than the complete compliance which might result from a formal proceeding. It is felt that the practice, in its over-all use, goes far to obtain the declared objective of the Act to assure employees of their right to self-organization and to encourage "practices fundamental to

the friendly adjustment of industrial disputes" (Section 1 of the Act, *infra*, pp. 79–80). By accomplishing the "rapid removal" of such disputes "from the area of possible industrial conflict * * * the benefits of such settlements have accrued to the employers and employees directly involved, as well as to the general public" (National Labor Relations Board, *First Annual Report* (1936), p. 31).[10]

Settlements generally are arranged by the Board's agents working in the field and are likely

[10] The Board's extensive use of settlements to terminate disputes, either in the course of formal proceedings or where no formal action has been taken, and the importance of the settlement device in the administration of the Act, are shown in the Board's Annual Reports. See *First Annual Report* (1936), pp. 30–31 (45 percent of all cases closed were settled); *Second Annual Report* (1937), pp. 15–17 (60 percent of all cases closed were settled); *Third Annual Report* (1938), pp. 20–22 (52 percent of all cases closed were settled; of the 4,621 cases settled, 2,972, or 64 percent, involved unfair labor practices); *Fourth Annual Report* (1939), pp. 19–22 (47 percent of all cases closed were settled; of the 3,069 cases settled, 2,072, or 67 percent involved unfair labor practices); *Fifth Annual Report* (1940), pp. 14, 16–18, 20, 26 (39 percent of all cases closed were settled; of the 2,888 cases settled, 1,877, or 65 percent, involved unfair labor practices); *Sixth Annual Report* (1941), pp. 14–15, 25, 26, 27, 29 (50 percent of all cases closed were settled; of the 4,283 cases settled, 2,142, or 50 percent, involved unfair labor practices); *Seventh Annual Report* (1942), pp. 22–25, 28–30, 80–86 (51 percent of all cases closed were settled; of the 5,968 cases settled, 2,450, or 41 percent, involved unfair labor practices); *Eighth Annual Report* (1943), pp. 20–23, 91, 92 (47 percent of all cases closed were settled; of the 4,592 cases settled, 1,358, or 30 percent, involved unfair labor practices).

to come directly to the Board's attention only in the comparatively few instances where a disagreement arises concerning them. Where such disagreements do arise, however, in order to encourage the friendly settlement of disputes, and to foster confidence in its agents on the part of management and labor, the Board has, by custom, established a working rule that where a settlement agreement approved by a Board agent is adhered to by the parties the Board will respect its terms and will not go behind such agreement to investigate or prosecute unfair labor practices alleged to have occurred prior thereto.[31] At the same time the Board has consistently held that where subsequent events show that a settlement or other adjustment is not accomplishing the purposes of the Act, because the employer violates or continues to violate the Act after entering into it, the Board will disregard such agreement and consider the employer's entire course of conduct both before and after the agreement was executed.[32]

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[31] *Matter of Corn Products Refining Co.*, 22 N. L. R. B. 824, 828–829; *Matter of Wickwire Brothers*, 16 N. L. R. B. 316, 325–326; *Matter of Godchaux Sugars, Inc.*, 12 N. L. R. B. 568, 576–579; *Matter of Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885, 888; cf. *Matter of the Locomotive Finished Material Company*, 52 N. L. R. B. 922, 927.

[32] *Matter of the Locomotive Finished Material Company*, 52 N. L. R. B. 922, 926–928; *Matter of Chicago Casket Company*, 21 N. L. R. B. 235, 252–256; *Matter of Harry A. Halff*, 16 N. L. R. B. 667, 679–682; cf. the *Wickwire* decision cited in footnote 11, *supra*.

The Board's practice in this respect has been recognized by the courts as properly within the Board's administrative discretion.[13] It is "a fun-

[13] As to settlements, see: *Sperry Gyroscope Co. v. National Labor Relations Board*, 129 F. (2d) 922, 926, 931 (C. C. A. 2); *National Labor Relations Board v. F. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304 (C. C. A. 3); *National Labor Relations Board v. Hawk & Buck Co.*, 120 F. (2d) 903, 904–905 (C. C. A. 5); *National Labor Relations Board v. Prettyman*, 117 F. (2d) 786, 792 (C. C. A. 6); *National Labor Relations Board v. General Motors Corp.*, 116 F. (2d) 306, 312 (C. C. A. 7); *National Labor Relations Board v. Thompson Products, Inc.*, 130 F. (2d) 363, 366–367 (C. C. A. 6); *Canyon Corp. v. National Labor Relations Board*, 128 F. (2d) 953, 955–956 (C. C. A. 8).

For decisions holding that representation proceedings, whether or not they culminate in the certification of a bargaining representative, neither estop the Board from subsequently investigating and prosecuting charges of unfair labor practices alleged to have occurred prior thereto, nor constitute *res judicata* of such charges, see: *Warehousemen's Union v. National Labor Relations Board*, 121 F. (2d) 84, 92–94 (App. D. C.), certiorari denied, 314 U. S. 674; *Magnolia Petroleum Co. v. National Labor Relations Board*, 115 F. (2d) 1001, 1012–1013 (C. C. A. 10); *Utah Copper Co. v. National Labor Relations Board*, 139 F. (2d) 788, 791 (C. C. A. 10), certiorari denied, 64 S. Ct. 946, *sub nom. Independent Ass'n of Mill Workers v. National Labor Relations Board*; *National Labor Relations Board v. Swift & Co.*, 127 F. (2d) 30, 31 (C. C. A. 6); *National Labor Relations Board v. Standard Oil Co.*, 142 F. (2d) 676 (C. C. A. 6), enforcing with modifications 47 N. L. R. B. 517, petition for certiorari pending, No. 204, this Term; *National Labor Relations Board v. Stone*, 125 F. (2d) 752, 756–757 (C. C. A. 7), certiorari denied, 317 U. S. 649; cf. *National Labor Relations Board v. Sun Shipbuilding and Dry Dock Co.*, 135 F. (2d) 15, 18, 23 (C. C. A. 3).

Cf. *United States v. City and County of San Francisco*, 310 U. S. 16, 31–32; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408–409.

damental conception of our law * * * [that] there can be no rule which would restrict the Board from an appropriate inquiry into a pending complaint * * * [and that] the extent to which the Board may refuse to go into matter raised by a complaint, either because the matter is stale or because it has been satisfactorily concluded theretofore, must rest in the Board's discretion." *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. (2d) 304, 305–306 (C. C. A. 3). We submit that to hold otherwise would be contrary both to the provisions of Section 10 (a) and the purpose of the statute to prevent interruptions to commerce.

B. Even if the case were merely a matter between private parties, however, petitioner would be in no position to complain. It will be noted that the settlement specifically provided that petitioner, "on condition that [the Union] agrees to withdraw the charge", agreed "in no wise to interfere with, restrain or coerce its employees in the rights guaranteed in Section 7 of the National Labor Relations Act; * * * in no wise to dominate or interfere with the administration of the Richwood Clothespin and Dish Workers' Union * * *" (R. 53); and "not to coerce or intimidate any of its employees in regard to Union membership" (R. 54). The Union, on its part, agreed to "request withdrawal and hereby does request withdrawal of said charge on condition that [petitioner] fully and faithfully complies with this

agreement * * *" (R. 53–54). Thus the settlement was in terms conditioned upon petitioner's future compliance with the Act. After the charge was withdrawn (R. 15), and while the Board and the Union were complying with the terms of the settlement, petitioner entered into and gave effect to the closed-shop agreement with the knowledge that the Independent intended to use the agreement to deprive employees of their jobs because they had previously supported the Union. If, as we contend (Pt. II, *infra*, pp. 33–72), such conduct was in violation of Section 8 (1) and (3) of the Act, it constituted a breach of an essential condition of the contract.

Upon these facts the Board's action in upsetting the settlement finds full support in the general principles of contract law without regard to the Board's peculiar powers as an administrative agency of the Federal Government. Whether the settlement be regarded as in the nature of a compromise, an accord and satisfaction, or an ordinary bilateral contract, the applicable principle is clear. Where one party to a contract fails in the performance of a material part of his promise, or fails to satisfy a substantial condition, the other party is relieved of further performance and may treat the contract as terminated.[14] "By the general principles of

[14] See 3 Williston on Contracts (Rev. Ed.) Secs. 813, 831, 841; and 6 *id.* Sec. 1848.

contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from further performance on his side." *The Eliza Lines*, 199 U. S. 119, 129; *Rochm* v. *Horst*, 178 U. S. 1, 8; *Farmers' Loan and Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; *Phillips and Colby Construction Co.* v. *Seymour* 91 U. S. 646, 649. Similarly, the "breach of * * * a dependent covenant, one which goes to the whole consideration of the contract gives to the injured party the right to treat the entire contract as broken * * *." *Kauffman* v. *Raeder*, 108 Fed. 171, 179 (C. C. A. 8), certiorari denied, 191 U. S. 567; *Sylvania Industrial Corp.* v. *Lilienfeld's Estate*, 132 F. (2d) 887, 891–892 (C. C. A. 4); *Knutson* v. *Metallic Stab. Form Co.*, 128 F. (2d) 408, 411 (C. C. A. 5); *Fore River Shipbuilding Co.* v. *Southern Pacific Co.*, 219 Fed. 387, 393 (C. C. A. 1). And a party "asserting that the contract [is] still in force, [is] bound to show such performance on his part as [would entitle] him to demand performance on [the other party's] part." *Norrington* v. *Wright*, 115 U. S. 188, 205; *Lamborn* v. *National Bank of Commerce*, 276 U. S. 469, 472; *New York Life Insurance Co.* v. *Viglas*, 297 U. S. 672, 679–680; *City of Columbus* v. *Mercantile Trust and Deposit Co. of Baltimore*, 218 U. S. 645, 660–661. To the same effect, a party seeking to avail himself of a compromise must show performance

on his part (*Brown* v. *Spofford*, 95 U. S. 474, 484) and "if part of the consideration agreed on be not performed, the whole accord fails." *First National Bank of Arkansas City* v. *Leech*, 94 Fed. 310, 311 (C. C. A. 8); *City of Memphis* v. *Brown*, 20 Wall. 289, 308–309; *Shubert* v. *Rosenberger*, 204 Fed. 934, 938 (C. C. A. 8); *Unterinyer* v. *Bowers*, 79 F. (2d) 9, 11 (C. C. A. 2); *The Joy*, 290 Fed. 407, 408 (E. D. N. Y.).

Applying these principles to the case at bar, it is clear that when petitioner violated the Act subsequent to the settlement agreement it failed in the performance of a most material part of the consideration it had promised in return for the settlement and thereby breached the settlement agreement and relieved the Board and the other parties thereto from any obligation to give it effect. The condition placed by the Union on its withdrawal of the charge of past violation (i. e., that petitioner comply in the future with the agreement and the Act) could have no significance if the Union were not relieved of its obligation and thereby rendered free to press its original charge anew if the company again violated the Act. Petitioner thus is in no position to advance the settlement agreement as a shield against accountability for its wrongful conduct prior thereto. Nor is the Independent in any better position than petitioner to complain of the Board's refusal to observe the terms of the settle-

ment after the agreement had been breached. As the court below declared (R. 351), the "high-handed conduct of the Independent" was "in violation of the clear spirit of the compromise agreement * * *."

We submit that a consideration of the problem with which the Board was faced, and of the circumstances under which it arose, demonstrates the complete reasonableness of the solution which the Board adopted. The problem was, first, whether petitioner by entering into the closed-shop contract with knowledge that the Independent intended to use the contract to expel former union adherents from the plant, and by discharging 43 employees pursuant to the contract, violated Section 8 (3) of the Act. Having found against petitioner on this point (R. 21–24), the Board's problem remained how fully to remedy the wrong done and how to dispose of the Union's charge, based principally upon events alleged to have occurred prior to the settlement and the certification of the Independent, namely, that petitioner had dominated and supported the Independent in contravention of Section 8 (2) of the Act.

If the Board had followed the course advocated by petitioner, and allowed the settlement and certification to stand, it would have left the employees with an officially approved exclusive bargaining representative which, in the Board's

view, had been dominated and supported by petitioner prior to the settlement and had, subsequently thereto, forced the unfair and illegal result of the closed-shop agreement, so as to penalize the former union adherents for having exercised their rights under the Act (*infra*, pp. 33–42, 72–78). In the face of the questionable conduct of both petitioner and the Independent with respect to the closed-shop agreement, the Board was asked to close the door to an exploration of the entire relationship between the two. Moreover, it was asked to sustain the settlement and certification despite its conclusion that, far from serving their intended purpose to effectuate the policies of the Act, they were in fact being used as the allegedly lawful excuse for an absolute frustration of that purpose (*infra*, pp. 33–42, 69–70).

We submit that the Board acted altogether reasonably in deciding that it should not, for the sake of sustaining its past administrative determinations, which had not been complied with, sacrifice the statutory rights of petitioner's employees. Certainly the Board's refusal to do so cannot be called arbitrary or capricious.

This is not to say that the Board may ignore the "fundamentals of fair play." On the contrary, they are elemental to the administrative process. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143; *Jefferson Electric Co.* v. *National Labor Relations*

*Board*, 102 F. (2d) 949, 954 (C. C. A. 7). But "fair play," even in disputes between private parties, entails a weighing of conflicting interests. The case at bar, however, affects the private interests of petitioner, its employees, the Union, and the Independent only incidentally. Dominant over these is the public interest in the enforcement of the policies of the Act. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269; and authorities cited *infra*, p. 65. And it is fundamental that where private interests clash with the public interest the former must yield. Hence, petitioner here was entitled, not to abstract "fair play" with respect to its private interests as against other private interests affected, but to the "fair play" which the public interest, as embodied in the Act, would, in all the circumstances, permit." The Board,

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Thus, the fact that petitioner had relied upon the settlement agreement and the certification of the Independent in entering into the closed-shop agreement with the latter was but one of the many considerations the Board had to weigh in determining whether the threat to the purposes of the Act, inherent in the situation, was sufficiently serious to warrant setting aside the settlement agreement and the certification. Similarly, whatever hardship may have fallen upon petitioner as a result of the Board's final action was but one of the factors for the Board to consider. It could not be the controlling consideration. *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 533 (C. C. A. 6); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); cf. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 474.

in the exercise of its administrative discretion, was required to resolve the conflict, and we submit that the Board reasonably determined that the policies of the Act, and the public interest therein effectuated, would be served effectively in the case at bar by setting aside the settlement and certification and considering the entire course of petitioner's conduct and its relations with the Independent. It follows, of course, that the Board, upon such consideration having found that petitioner violated the Act within the meaning of Section 8 (1), (2), and (3), was not barred by the settlement and certification from prescribing the normal remedy therefor.

Manifestly the foregoing argument supports the Board's action in upsetting the settlement and certification[15] only if the Court approves the Board's finding that petitioner violated the Act by executing the closed-shop agreement with the Independent, since that was the only unfair labor practice the Board found petitioner had engaged in subsequent to the settlement agreement. We are of the opinion, however, as was the court below, that the narrow ground upon which the Board based its determination to upset the settle-

[15] Of course, if it was proper for the Board to go behind the settlement and find that the Independent was dominated and interfered with in violation of Section 8 (2) of the Act, the certification of the Independent automatically became invalid.

ment and certification (R. 21–24) need not be the test of the propriety of its action. We believe that the Board's powers of administrative discretion furnish a broader test and that the unusual circumstances of this case, involving, as they did, questionable conduct by both petitioner and the Independent, justified the Board's exploration of the entire affair regardless of whether or not the making of the closed-shop agreement subsequent to the settlement be considered unlawful. The court below declared that (R. 350–351):

> * * * even if discharges such as those here involved be not considered of themselves unfair labor practices within the meaning of the act, we think that the Board was justified under the circumstances, notwithstanding the agreement that had been made and the certification of the Independent, in going fully into the question of company domination and holding the Independent to be a company-dominated union and hence not entitled to invoke the closed-shop provision. * * * [The] high-handed conduct of the Independent union here, is in violation of the clear spirit of the compromise agreement as well as of the rights of the minority, and the acquiescence of the company in that conduct, furnished ample justification for the Board to inquire fully into the history of the union * * *.

## II

THE CLOSED-SHOP AGREEMENT WAS INVALID UNDER SECTION 8 (3) OF THE ACT BECAUSE PETITIONER ENTERED INTO AND GAVE EFFECT TO THE TERMS OF THE AGREEMENT WHEN IT KNEW THAT THE INDEPENDENT INTENDED TO REFUSE MEMBERSHIP TO EMPLOYEES BECAUSE THEY HAD PREVIOUSLY ENGAGED IN ACTIVITIES IN BEHALF OF THE UNION

There is no question but that the purpose and effect of the closed-shop agreement was to discriminate against employees because they had exercised their lawful right to engage in activities in behalf of the Union. The Board found (R. 23) that the agreement was not intended to achieve the lawful purpose "merely to require employees to seek membership in the Independent as a condition of employment," but that, on the contrary "its real purpose" was, as petitioner knew, "to bar from future employment with the [petitioner] persons who had adhered to the charging Union in the election campaign." The Board found further (R. 19, 24) that 31 employees applied for, and were refused membership in the Independent because of their previous support of the Union and that they were therefore discharged by petitioner.[17] The court below affirmed this determination (R. 347–348). Contrary to

[17] The Board found that petitioner unlawfully discharged a total of 43 employees, all former members of the Union, pursuant to the terms of the illegal closed-shop agreement (R. 24). Of these, 31 had applied for and had been refused membership in the Independent, as noted above, and 12 had never applied for such membership (R. 19, 24). But since the Board found the closed-shop agreement invalid *ab initio*

petitioner's assertions (Br. 39–47), there is substantial evidence that at the time of the discharges petitioner had ample reason to believe that the employees had been excluded from membership pursuant to the policy announced by the Independent in its letter to petitioner of February 28, 1942, and that a substantial number of the 43 had actually applied for membership and been rejected (R. 287–289, 300, 307–308, 224; *supra*, pp. 10–12).

It cannot seriously be contended that petitioner, when it made the closed-shop agreement, was not aware of the true purpose of the Independent to exclude supporters of the Union from future employment. As the court below held (R. 347), "the Independent * * * clearly indicated to the Company that one of the purposes of such agreement was to get rid of employees who were unacceptable because of prior union activities."[18] In view of this knowledge on the part of the com-

the discharge of any employee pursuant thereto was necessarily discriminatory and in violation of Section 8 (3) of the Act (R. 24).

[18] Thompson's letter of February 28 (*supra*, pp. 10–11) demanded a closed-shop contract on the ground that it was the "only protection * * * available" to the Independent against dissipation of its small majority, since it not only would "give us some measure of control in preventing the hiring of additional employees who are unfavorable to our interests," but "would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill * * * whose presence in the plant is unfavorable to our interests * * *." The letter then plainly stated that the Independent would refuse membership to such "unfavorable" employees and thereby foreclose their employment (R.

pany of the Independent's plan it is of no consequence whether the company knew previously which of the 43 employees had made application to the Independent and been rejected. The number of persons to be discharged itself would have put the company on notice that the Independent had been carrying out its previously announced policy. The question is whether the proviso to Section 8 (3) of the Act permits the discrimination in which petitioner has engaged. The Board held that it does not.

A. THE PROVISO TO SECTION 8 (3) DOES NOT COUNTENANCE AN ENCROACHMENT UPON THE BASIC RIGHTS THE STATUTE GUARANTEES TO EMPLOYEES

Section 8 (3) of the Act makes it an unfair labor practice for an employer——

> By discrimination in regard to hire or tenure of employment or any term or con-

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288–289). The naming of Dodrill, the Union's president and leading organizer and a "union agitator" in the eyes of petitioner (*supra*, p. 6); left the intention and purpose of the Independent unmistakably clear.

That the Independent in fact carried out its intention is equally clear, not only from Thompson's letter, but from the fact that all of the 31 employees whose applications for membership were rejected were members of the Union. (R. 82–83, 99, 152–153, 38). Nor does the fact that some former union adherents were admitted to membership in the Independent (R. 122–123, 191–192) alter the picture. The purge instituted by the Independent was so sweeping that it could accomplish its aim without complete precision in execution. Cf. *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 67–68 (C. C. A. 2), affirmed, 309 U. S. 629; *Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. (2d) 629, 633 (C. C. A. 5).

> dition of employment to encourage or discourage membership in any labor organization:

The subsection then contains the following proviso:

> *Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Under the language preceding the proviso, there can be no question but that the discharge of the 43 employees constituted a forbidden discrimination. The Board's findings make it clear that the scheme of the Independent was to deny membership to these individuals, and thus to exclude them from employment because of their past adherence to the Union. It is true that this plan did not originate with petitioner, but it is likewise true that petitioner did acquiesce in the Independent's proposal and did make itself the instrument for its effectuation. On principle and under the uniform decisions of the Circuit Courts of Appeals, the statutory test of discrimination is thus satisfied. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Hudson Motor*

*Car Co.*, 128 F. (2d) 528, 532–533 (C. C. A. 6); *National Labor Relations Board* v. *Gluck Brewing Co.*, decided August 7, 1944 (C. C. A. 8); *South Atlantic Steamship Co.*, v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, 313 U. S. 582.

The proviso equips the employer with a defense against such a charge of discrimination in narrow circumstances. The proviso does not, of course, attempt directly to control the internal affairs of labor organizations or the conditions under which they may deny membership to employees or expel those who have become members. Such controls the statute leaves where it found them, in the states. But the proviso, in describing the circumstances under which an employer may defend against a charge of discrimination, affects union conduct indirectly in denying to labor organizations benefits under the National Labor Relations Act which might otherwise be open to them. This does not mean that an organization lacks the power to determine its own membership qualifications without restriction, subject only to state law, but it may mean that if an organization wishes to exercise the right under the federal statute to act as exclusive representative of a bargaining unit it must give up such of its former prerogatives as would permit it to discriminate against members of the unit it purports to represent.[19] In applying the proviso the ques-

proposition (Br. 52) "that a union has exclusive control of

[19] Petitioner cites a number of state decisions for the

tion is not whether a labor organization is free under the law of any particular state to permit or deny membership on its own uncontrolled terms, but whether the language of the proviso permits the conduct under scrutiny, when knowingly participated in by an employer, to serve as a defense to what would otherwise be a violation of Section 8 (3).

Literally, the proviso protects "an agreement with a labor organization * * * to require as a condition of employment membership therein." An agreement under which all persons within the unit are required to become members of the contracting union, and only those who, of their own choice fail to join are then excluded from further employment, is clearly within the quoted language.

This is the ordinary closed-shop agreement, and the Board has not suggested that such a contract would be invalid. But that was not the object of the agreement here, nor the manner in which it was performed. Here the Independent, with petitioner's knowledge, executed the agreement not

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admission to its own membership." Although this may be true as a general matter (but see *Cameron* v. *International Alliance*, 118 N. J. Eq. 11 (1935)) it does not follow that Congress intended the closed shop proviso to protect anything lawful in the states, no matter how inconsistent with the policy of the Act. Furthermore the state cases cited by petitioner on their face do not indicate that a closed shop entered into for the purpose of exclusion of employees in the opposing Union would be valid. At the very least, there is not sufficient authority dealing with any such problem to warrant a generalization as to the state rule.

in order to bring all the employees within the organization but to keep a substantial number of them out; and this solely on the basis of the past exercise by these employees of rights granted under the Act. Such an arrangement goes beyond the traditional closed-shop which the proviso was designed to protect—the *requirement* of membership.

Conceivably, the proviso could be read to give the contracting union and the employer unrestrained license to exclude from employment any person denied membership for any reason or no reason. But the provision need not be so construed, for its language shows that Congress was concerned with a contract aimed at bringing all employees into an organization. Otherwise, as here, the right to require membership as a condition of employment may be converted into a blanket right to deny membership so as to exclude from employment. The other provisions of the Act, as well as the other pertinent guides to statutory construction, support a restrictive reading of the proviso, and, in turn, furnish guides as to the validity of the terms of membership here imposed.[20]

Accordingly, the Board, exercising its duty to give effect to the policies of the Act generally,

[20] Also, to the extent that the Independent was deliberately discriminating against employees in the bargaining unit, it was not acting as their "representative," within the meaning of the proviso. The provisions for majority representation

looked, not alone at the language of the proviso, but interpreted that language in its relation to the statute as a whole (R. 22).[21] In so doing the Board properly said "the proviso relating to the closed-shop is not a severable and separate portion of the Act. It must be construed in the light of the statutory statements of policy and the general provisions of the Act * ** * the express purpose [of which] is to insure employees of their right to self-organization and a free choice of representatives" (R. 22).

In the light of the entire statute, the Board concluded that the proviso to Section 8 (3), which prescribes the only conditions under which a lawful closed-shop agreement may be made (*supra*, p. 36), sanctions neither the making of a closed-shop agreement under the circumstances here present, nor the result achieved (R. 21–22). The

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in Section 9 (a) would seem to impose upon the representative a duty to act on behalf of all the members of the bargaining unit equally and in good faith. Accordingly, it can be said that the Independent lost its standing as representative under Section 9 (a) by reason of the conduct in question; and only a "representative of the employees as provided in section 9 (a)," is permitted to take advantage of the proviso in Section 8 (3). The Board did not base its decision on this theory, but we call it to the Court's attention as additional support for the decision reached. See *infra*, pp. 47–55, 59–69.

[21] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

Board held, as it had in two earlier cases,[2] that the proviso does not countenance the use of a

[2] In *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040, the Board held that a valid closed-shop contract did not protect an employer where the contracting union persuaded the employer to discharge certain employee members of the union because, shortly before the expiration of the contract, they indicated their intention to seek representation by another union. The Board there stated that, "We cannot allow the declared intention of Congress to be evaded by permitting an employer and a union thus to combine to preclude the employees from expressing their choice. The proviso in Section 8 (3) cannot therefore be considered as an instrument for depriving employees of their statutory right to select another representative for a period succeeding the term embraced by the closed-shop contract" (46 N. L. R. B. at 1042).

In *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, a majority of the employees in an appropriate bargaining unit applied for membership in a union, thereby designating it as their representative for collective bargaining purposes. The union persuaded the employer to enter into a closed-shop contract, both the employer and the union knowing that the latter intended to reject the employees' applications for membership thereby excluding them from employment, and to have the employer replace them with new employees who were members of the union. The Board found that (p. 1318) "the purport of the agreement was to close the shop against [the employees] and to distribute their jobs to non-employee members of" the union. It concluded, therefore, that the agreement and the subsequent discharge of the employees who were denied membership in the contracting union were not in conformity with the proviso to Section 8 (3), since the union had repudiated its representative status and the agreement was "not the culmination of bona fide collective bargaining between an employer and a labor organization acting as the exclusive representative of his employees, within the meaning of Section 9 (a), but

closed-shop agreement "as an instrument for effecting discrimination against * * * employees solely because of their prior union activities," or "to penalize employees whose choice of representatives was not that of the majority," or to "deprive employees of their statutory right to select bargaining representatives" (R. 21–23). The broad purpose of the statute, its language, its legislative history, the opinions of experts in the labor relations field as to the function of the closed shop, and decisions of the courts, support the limited construction which the Board (R. 21–23) and the court below (R. 349–350) placed upon the closed-shop proviso.[25]

*The purpose of the Act.*—The declared objective of the Act, as the Board observed (R. 22), is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" for the purpose of collective bargaining, and to encourage "practices fundamental to the friendly adjustment of industrial disputes." (Section 1

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[was] an unlawful device for depriving the employees of their jobs" (44 N. L. R. B., at 1318–1319).

[25] In view of the limiting terms of the proviso (*National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–695) a narrow construction is proper. *United States* v. *Scharton*, 285 U. S. 518, 521–522; *United States* v. *McElvain*, 272 U. S. 633, 639; *United States* v. *Dickson*, 15 Pet. 141, 165.

of the Act).[24] And freedom from fear on the part of the employees that they will suffer from the assertion of their organizational rights is recognized as an element essential to the achievement of that objective.[25] Employees will not be assured of the freedom to organize and select representatives of their own choosing, however, if

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[24] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 182–183; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 165–166; *National Labor Relations Board* v. *Wamhoff Mills, Inc.*, 114 F. (2d) 226, 232–234 (C. C. A. 1); *National Labor Relations Board* v. *Reth Packing Co.*, 115 F. (2d) 217, 219 (C. C. A. 8).

[25] The reinstatement and back-pay provisions of Section 10 (c) of the Act are designed to just this end. Thus the Circuit Court of Appeals for the Eighth Circuit has noted, in *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609, 612, that it is necessary "* * * for the workmen in industry generally to feel assured that they would be protected, as fully as soundly possible, not merely in the exercise of their right of self-organization and designation of representatives of their own choosing, but against the economic consequences of a legitimate assertion of those rights. The experience of the Board, as reflected in its decisions, demonstrates the need for this assurance." Similarly this Court said in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 541, that "If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights."

they know that, in a situation where more than one union has secured a following among them, those who choose the wrong candidate may be discharged. On the contrary, if the employer and the majority representative were free to enter into a closed-shop contract designed to discriminate against the defeated minority group of employees, the freedom of the employees to choose a representative would be impaired. In all cases where it appeared likely, or even possible, that a closed-shop agreement might follow the selection of a majority representative, the employees would be impelled to speculate as to which organization would ultimately win the support of the majority in order to avoid becoming marked as supporters of the minority group. The employees' right to support and select the bargaining representative he wanted would be reduced to the right to guess which of two or more competing unions would ultimately be chosen by the majority. And they would make their selection at their peril. In holding that this result would be contrary to the fundamental purpose of the Act the Board has applied a reasonable and realistic interpretation both to the proviso to Section 8 (3) and to the Act as a whole.

*The legislative history*—The Congressional intent in writing the proviso to Section 8 (3) into the Act was not to legalize or encourage the adoption of the closed-shop generally, but to achieve the

very different purpose of preserving the *status quo* in the matter of the legality of closed-shop contracts under the laws of the several States, with the exception that such contracts thenceforth were to conform to the requirements of the Act, where the employer was subject to its jurisdiction. Both the Senate and House Committee reports state that Section 7 (a) of the National Industrial Recovery Act [26] had resulted in confusion and misunderstanding as to the legal status of the closed-shop contract and that the proviso to Section 8 (3) of the National Labor Relations Act was designed to clarify its status.[27]

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[26] Section 7 (a) of the National Recovery Act (48 Stat. 195, 198–199) read, in part, as follows:

"* * * no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. * * *"

[27] The Senate Committee stated: "The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees 'to organize and bargain collectively through representatives of their own choosing' was deemed to illegalize the closed shop. * * * [the proviso to Section 8 (3) was designed] to prevent similar misconceptions of this bill." (S. Rep. No. 573, 74th Cong., 1st Sess. p. 11.)

To the same effect, the House Committee said, "All that [the proviso to Section 8 (3)] does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) [of the National Industrial Recovery Act] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill * * *."—(H. Rep. No. 1147, 74th Cong., 1st Sess. p. 19.)

The Senate Committee said that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions * * *" (S. Rep., pp. 11–12). Similarly the House Committee said "the bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed shop agreements in the States where they are legal" (H. Rep., pp. 19–20). Finally, the Senate Committee declared that the "propaganda * * * that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry * * * is absolutely false * * *. The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements" (S. Rep., pp. 11–12).

The purpose, therefore, of the proviso to Section 8 (3), in the eyes of Congress, was to permit the making of closed-shop agreements where such agreements are valid under State laws, to the extent that such agreements are consistent with the provisions and policies of the Act. Its purpose, indeed, was to define the narrow limits

within which the exceptional discrimination against employees because of union affiliation inherent in a closed-shop arrangement was to be permitted under the Act.

In the instant case a minority group of employees who exercised their right under the Act to sponsor the Union in the election campaign was discriminated against, and the employees lost their jobs *because* they had exercised that right. In view of the plain intent of the legislators to protect employees' freedom to organize and to eliminate such restraints upon their exercise of that freedom, there is no room for the contention that the proviso countenances such a result. On the contrary, we submit that even if the letter of the proviso appears to be satisfied, a closed-shop agreement still does not grant the employer and the contracting union *carte blanche* to do as they will without regard to the statutory rights of individual or minority groups of employees. In short, a closed-shop agreement under the Act does not constitute a loophole through which the broad purposes and spirit of the Act may be circumvented and defeated.

Since a closed-shop agreement is valid only, among other conditions, if made with a "labor organization [which] is the representative of the employees as provided in section 9 (a)" (Section 8 (3) of the Act), an examination of the function of Section 9 (a) is essential to a proper

consideration of the validity of a closed-shop agreement under the Act.[*] Congress adopted the majority rule principle in Section 9 (a), after grave consideration of the possibilities it afforded for abuse, as the only workable scheme by means of which an employer and his employees could engage in the collective bargaining the Act seeks to encourage. The House Committee (H. Rep., p. 21) stated that "majority rule * * * is the only practical method of achieving the desired ends."[**] At the same time testimony taken by

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[*] It is significant that the bill originally permitted the employer to make a closed shop contract with the "representative of the majority of the employees" but was amended to require the contracting labor organization to be "the representative of the employees as provided in Section 9 (a)." 79 Cong. Rec. 7650.

[**] The Senate Committee pointed out that "the principle of majority rule has been applied successfully by governmental agencies * * *." It noted that "It was promulgated by the National War Labor Board created by President Wilson in the spring of 1918. It has been followed without deviation by the Railway Labor Board, created by the Transportation Act of 1920. Public Resolution No. 44, approved June 1934, contemplated majority rule in that it provided for secret elections. The 1934 amendments to the Railway Labor Act * * * [embodied the principle]" (S. Rep., p. 13). The House Committee made similar reference to these precedents (H. Rep., p. 22). And Dean Lloyd K. Garrison of the Law School of the University of Wisconsin stated before the Senate Committee that "* * * everybody that has had to deal with this problem * * * [has], without exception, applied the majority rule. * * * What other rule could possibly work?" Senate Committee on Education and Labor, 74th Cong., 1st Sess. on S. 1958, Part 2, p. 127.

the Committees of both the Senate and House,[30] the debates on the floors of both Houses,[31] and the Committee reports, reveal that Congress was acquainted with, and intended to avoid, the danger to minority groups of giving legal sanction to a totally unrestrained majority representative. The House Committee (H. Rep., p. 20) stated that, "the underlying purposes of the majority rule principle are simple and just." The Senate Committee declared that the principle "is sanc-

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[30] Numerous witnesses testified as to the danger of the majority rule principle to individual and minority employees, e. g., before the Senate Committee on Education and Labor, U. S. Senate, 73rd Cong., 2d Sess., on S. 2926, Robert L. Hale, Professor of Law at Columbia University, Part 1, p. 57; William E. Taylor, Chairman Legislative Committee, D. C. Branch, National Association for the Advancement of Colored People, Part 3, pp. 997–998; T. Arnold Hill, The National Urban League for Social Service Among Negroes, Part 3; pp. 1020–1022; before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, James Myers, Industrial Secretary, Federal Council of the Churches of Christ in America, Part 2, p. 224; Walter Gordon Merritt, Part 3, pp. 318–321; James T. Donnelly, Executive Vice-President, Illinois Manufacturers' Association, Part 3, p. 511; A. B. Trembley, Part 3, pp. 548–549; James Emery, general counsel, National Association of Manufacturers, Part 3, p. 855; before the House Committee on Labor, 74th Cong., 1st Sess., on H. R. 6288, Hon. Frances Perkins, Secretary of Labor, pp. 278–279; Dr. E. R. Lederer, pp. 307–308.

[31] The problem of the rights of minorities was raised in the debates, e. g., in the Senate: Senator Wagner: "* * * majority rule recognizes minority rights." 79 Cong. Rec. 7571; Senators Hastings, Walsh and Wagner: 79 Cong. Rec. 7671–7673; in the House: Messrs. Connery, Taylor and Wood, 79 Cong. Rec. 9686–9687.

tioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (S. Rep., p. 13). The evidence is plain that what Congress had in mind was to implant in the field of labor relations the same concept of majority rule which permeates the democratic process, including the same obligation on the part of the majority to observe the rights of minorities.[32] The House Committee noted that "Majority rule is at the basis of our democratic institutions" (H. Rep., p. 21).

On the basis of the political analogy alone it seems clear that Congress could not have intended that the designation of the representative selected by the majority of the employees in a proper unit as the "exclusive" representative of "all the employees" in the unit should clothe that representative with a power it might exercise arbitrarily and accountable to no one. More specific evidence of Congress' intention that the Act

[32] Discussing the bill on the floor of the Senate, Senator Wagner, referring to Dean Lloyd K. Garrison said: "He has made it clear that democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered" (79 Cong. Rec. 7571). Similarly, Representative Winthrow on the floor of the House said: "The right of self-government through fairly chosen representatives is a right which is inherent to the American people and to our American form of government. This bill does no more than guarantee that right to American labor" (79 Cong. Rec. 9691).

should protect the rights of minority employees from being overridden by an irresponsible majority, however, is available in the reports of the Congressional Committees and the debates on the floors of both Houses.

The Senate Committee declared that "* * * majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the *traditional method* of a closed-shop agreement, made with the assent of the employer. And since in the absence of such an agreement the bill specifically prevents discrimination against anyone either for belonging or for not belonging to a union, the *representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority*" (S. Rep., p. 13; italics supplied). Similarly the House Committee stated that "Since the agreement will be unable to apply to all, *the minority group and individual workers are given all the advantages of united action* * * * [*and*] *agreements more favorable to the majority than to the minority are impossible* * * *" (H. Rep., p. 21, italics supplied). And the Senate Committee (S. Rep., pp. 13–14), after pointing out that the bill preserved the right of an individual employee or group of employees to present grievances to their employer, said:

> "Another protection for minorities is that the right of a majority group through its

representatives to bargain for all is confined by the bill to cases where the majority is actually organized "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.* (Italics supplied.)[33]

This statement indicates that the Senate did not intend that the broad powers of majority rule should be used by a union to exclude from employment persons it claimed to represent. This clearly appears from the previous history of the majority rule principle. The House Report[34] cites with approval the decision of the National Labor Relations Board established under Public Resolution No. 44, 73rd Cong., H. J. Res. 375, in *Matter of Hoade Engineering Corp.*, 1 N. L. R. B. (old) 35, which was the first decision applying the majority rule principle to employees within Federal jurisdiction other than those covered by the Railway Labor Act. The Senate Report,

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[33] It follows that an organization, however constgucted, which *in fact* does not "practice genuine collective bargaining" repudiates its statutory status as "exclusive" representative of employees. Compare the statement of the Board in *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, 1318–1319 (*infra*, p. 68, n. 45).

[34] H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20–21.

while not citing the *Houde* case, does refer to the fact that the majority rule principle had been applied under Public Resolution No. 44.[25] In the *Houde* decision, the old National Labor Relations Board reviewed the history of majority rule as developed by the First War Labor Board and by the Railway Labor Board and its successors. It then listed certain situations in which it suggested that majority rule might be inapplicable. Thus, in the *Houde* case (at p. 43–44), the old National Labor Relations Board stated:

> In concluding this opinion the Board wishes to indicate the limits beyond which it [majority rule] does not go. * * *
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> Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining, * * * or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.
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> Subject to these qualifications, the Board confines itself to holding that when a person, committee or organization has been designated by the majority of employees in

[25] S. Rep. No. 595, 74th Cong., 1st Sess., p. 13.

> a plant or other appropriate unit for collective bargaining, it is the right of the representative so designated to be treated by the employer as the exclusive collective bargaining agency of all employees in the unit, and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement covering terms of employment of all such employees.

A contemporaneous study of collective bargaining made by the Twentieth Century Fund likewise places similar limitations upon the applicability of majority rule.[36] The two limitations relevant to this case which are stated by the Twentieth Century Fund study are:

> 3. It lays down no rule as to an employer's duty where the majority group imposes restrictive rules of participation in its membership and government, excluding certain employees whom it purports to represent for collective bargaining.
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> 5. It lays down no rule in cases where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask the board for appropriate relief.

Likewise, in testimony before the Senate and House Committees it was indicated that unions

[36] Twentieth Century Fund, Inc., *Labor and Government* (New York, 1935), pp. 245-246.

enjoying the benefits of the Act must have an open membership policy. Thus, Paul Brissenden, Professor Economics at Columbia University, stated:[27]

> * * * the group which gets its policies and terms written into the protocol must be the recognized group, membership in which, of course, should be open and free from inequitable restrictions, as in the case of the trade associations.

The inescapable conclusion, in view of these considerations, is that Congress intended that the majority rule principle embodied in Section 9 (a) should include a "simple and just" (*supra*, p. 49) observance of the rights of minorities in keeping with the deep sense of justice which is fundamental to our democratic way of life and that the same principles, obviously, should be applied with particular care under the proviso of Section 8 (3).

*Understanding as to the meaning of the closed-shop.*—Presumably Congress meant to protect by the proviso of Section 8 (3) the closed-shop agreement which had been traditionally recognized in "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 346). Authorities in the field of labor relations support the view that

[27] Hearings before the Committee on Education and Labor, U. S. Senate, 73rd Cong., 2nd Sess., on S. 2926, Pt. 1, p. 216.

the purpose and function of the closed-shop, historically, has been to expand union membership, not to restrict it. The closed-shop prior to the passage of the Act was not considered a device to enable the contracting union to control employment on the "winner-take-all" basis which petitioner contends should have prevailed in the case at bar. Its purpose, rather, was to bring within the union fold, not merely the employees who had designated the union as their bargaining agent, but all of the employees in the particular shop or unit who were enjoying the fruits of the union's efforts to improve the lot of the workers. The major reasons advanced by responsible union leaders for seeking a "closed" or "union" shop[38] may be characterized as (1) "self-preservation" or "security" (2) "share the cost," (3) "responsibility," and (4) "sentimental" or "social." While they are necessarily inter-related to a de-

[38] Although these two terms are regarded by some authorities as essentially indistinguishable (Toner, *The Closed Shop*, p. 27), some modern union leaders eschew the term "closed shop" because they feel that opponents of the closed-shop principle have succeeded in distorting the term "closed shop" into an epithet by misrepresenting it as the label for a closed shop with a closed union irresponsibly exercising dictatorial powers over membership and job opportunities. In other words, the term "closed shop" has, in the opinion of those labor leaders, been widely construed as synonymous with the *misuse* and *misapplication* of the closed-shop principle. See Golden and Ruttenberg, *The Dynamics of Industrial Democracy*, pp. 191, 214–216; Appendix B, pp. 86, 100, 102–105, *infra*.

gree, the theory underlying these reasons for the closed-shop may be stated succinctly as follows:

(1) The "self-preservation" or "security" reason stems from the union members' fears that the employment of non-union workers will, by diluting the union's strength, weaken its bargaining power, and inevitably bring about a reduction of the improved working standards the union members have struggled to gain. The ultimate fear, of course, is that loss of effectiveness as a bargaining agent may destroy the union itself (Appendix B, pp. 91–102, 106–107, 111, 115–116, *infra*). (2) The "share the cost" reason is based upon the instinctively human feeling on the part of union member workers that "those who reap the benefits should bear the burdens." The improvement in their common status, achieved through the efforts of the union members, accrues to the benefit of all the employees in the shop or unit involved. The union members resent the fact that their often hard-won gains may be enjoyed by non-union "chiselers" who, by refusing to join in the common cause, not only fail to carry their share of the substantial burden involved, financially and in other respects, but stand as a potential threat to the union's bargaining position (Appendix B, pp. 90, 92, 99–102, 114–115, *infra*). (3) The "responsibility" reason is that a closed-shop, by giving the union greater control over the working force, enables the union to carry out with greater effectiveness and responsibility its

obligations as bargaining representative of the employees. The requirement that all employees become members of the union, subject to union discipline, eliminates possible interference with the Union's exercise of its representative function on the part of irresponsible non-member employees; and thus redounds to the welfare of both management and labor (Appendix B, pp. 93, 94, 98, 101, 102, 107–108, 113–114, *infra*). (4) The "sentimental" or "social" reason is that union men prefer, naturally, to work with their own kind, with men who are sympathetic to their views, and resent being required to work alongside of non-union men whose presence they regard as potentially dangerous to their cause (Appendix B, pp. 86–87, 98, 109–112, *infra*).

Implicit in the rationale underlying these basic reasons for which unions seek the closed shop is the principle that its purpose is "to control the non-unionists by bringing them into the fold" (Appendix B, pp. 86–89, 91–93, 98–99, 103–106, 109, 110–111, 116, *infra*), and not the contrary notion that a union holding a closed-shop contract is constituted an irresponsible and absolute dictator over employment in the shop.[*] It would be

[*] For instance the Steel Workers Organizing Committee, which has now become the United Steel Workers of America, C. I. O., invariably seeks to obtain a union-shop agreement with employers but whenever it loses an election it advises its own members to join the victorious union (Golden and Ruttenberg, *The Dynamics of Industrial Democracy*, Appendix B, p. 113, *infra*). And authorities in the labor rela-

anomalous, indeed, if the closed shop, which arose historically as a means of affording protection against employer opposition to those employees who believed in the necessity of organization, should be used, now that employees' right to freedom of organization is protected by Federal law, for the purpose of thwarting their exercise of that right.

*Court decisions.*—Decisions of this Court and of others support the Board's construction of the proviso to Section 8 (3), and of the Act as a whole, as applied in the case at bar. In *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–695, the Court noted the "illuminating comment" of the Senate Committee (*supra*, p. 46) to the effect that the proviso to Section 8 (3) was designed not "to facilitate closed-shop agreements" but, with certain exceptions, was to maintain "the *status quo* on this debatable subject." The Court has recognized, moreover, that the individual employee "becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement"; that "the very purpose of providing by statute for the col-

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tions find commonly regard the maintenance of a closed shop by a closed union, which arbitrarily refuses membership to eligible applicants, as a misuse of the closed-shop principle. "The result is a thoroughly unwholesome situation—legally, socially, and economically" Toner, *The Closed Shop*, p. 164; A. G. Taylor, *Labor Problems and Labor Law* (New York, 1938), pp. 90–92.

lective agreement" is to enable the employer and his employee to agree to terms "which reflect the strength and bargaining power and *serve the welfare of the group* [and that the] *benefits and advantages* [of such an agreement] *are open to every employee of the represented unit* * * *". (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 336, 338, italics supplied). "The statute guarantees *to all employees*," the Court has said, "the right to bargain collectively through their chosen representatives" (*Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 684, italics supplied). Similarly, the Circuit Court of Appeals for the Eighth Circuit declared that "* * * *a minority have a right to protection* to the end that they, as well as other employees of the unit, may have their full rights under Section 7" (*National Labor Relations Board* v. *Brashear Freight Lines, Inc.*, 119 F. (2d) 379, 381 (C. C. A. 8, italics supplied). To the same effect the Circuit Court of Appeals for the Sixth Circuit has held that an employer may not discriminate against employee members of a minority union in favor of employees who are members of the majority representative. *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532 (C. C. A. 6).

When a related problem arose under the Railway Labor Act (44 Stat. 577, 48 Stat. 1185) in *Brotherhood of Railway and Steamship Clerks*,

*et al.* v. *United Transport Service Employees of America*, 137 F. (2d) 817 (App. D. C.), reversed on other grounds, 320 U. S. 715,* Chief Justice Groner, in a concurring opinion, eloquently pointed to the injustice of permitting the majority representative to use its "exclusive" status under the statute so as to discriminate against a minority group of employees. In part he said (at 821–822):

> "* * * the Brotherhood, designated by the Board as the bargaining agent of the [Negro] porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to

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* This Court's reversal of the above decision in 320 U. S. 715, and the holdings in *Switchmen's Union of North America et al.* v. *National Mediation Board*, 320 U. S. 297, 305–307; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323, 336; and *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Southern Pacific Co.* v. *Southern Pacific Co.*, 320 U. S. 338, 342–344; are not contra to the principle expounded by Chief Justice Groner. Those decisions turned upon the point that the Railway Labor Act foreclosed judicial review of the National Mediation Board's decisions upon questions of representation under Section 2, Ninth of the Act, and therefore did not pass upon the merits. There is, of course, no question of the Court's authority to review the action taken by the Board in the instant case (Section 10 (e) of the Act).

membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. * * * that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. * * * nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. * * *. To perpetuate it by law would be to impose a tyranny in many respects analogous to "taxation without representation." And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to

enforce the Board's decision would be contrary to both the word and spirit of our laws.

These decisions support the proposition that the selection of a bargaining representative by the majority of the employees in an appropriate unit pursuant to Section 9 (a) of the Act grants no privilege to the employer and the bargaining representative to override the basic statutory rights of individual or minority groups of employees. And where, as in the case at bar, a closed-shop contract is involved, it follows that the rights of minorities must be given every possible protection.

*Conclusion.*—The principles and authorities reviewed above demonstrate the reasonableness of the Board's interpretation of the proviso to Section 8 (3) and of its holding that the proviso did not sanction the conduct of petitioner and the Independent. The stress which Congress (*supra*, pp. 51–54) and the courts (*supra*, pp. 59–63) have laid upon the fact that the Act was designed to extend freedom of organization to *all* employees, the concern of Congress over the rights of minority groups of employees under application of the majority rule principle (*supra*, pp. 47–55), the political analogy (*supra*, pp. 49–50), and the fundamental purposes of the statute (*supra*, pp. 32–40), compel the conclusion that the granting of the extraordinary right of "exclusive" representation under Section 9 (a) was intended to carry

reasonable obligations with it. While it is clear that Congress did not intend to establish the Board as a regulator of unions, it is equally clear that it did not mean to bestow upon employees and their representatives rights without bounds. The natural bounds are the policies of the Act and public policy generally, and the determination of when these bounds are exceeded was left to the Board."[41]

This Court has recognized that the Act does not protect employees in the exercise of "concerted activities" *per se*, but that the protection is conditioned upon an element of responsibility on the part of the employees. Their activities must not be contrary to the policies of the Act or otherwise contrary to public policy."[42] And

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[41] "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application * * * in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act * * *. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp'n. v. National Labor Relations Board*, 313 U. S. 177, 194.

[42] See *Matter of American News Company, Inc.*, 55 N. L. R. B. 1302, 1309-1314, where the Board discusses this problem in conjunction with the Court's decisions in *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 47; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 252-261; and *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332. Cf. *Cameron v. International Alliance, etc.*, 118 N. J. Eq. 41, where the court

the Court has repeatedly noted the importance of the public interest in labor relations questions (*Thornhill* v. *Alabama*, 310 U. S. 88, 103–104; *Carpenters & Joiners Union of America, et al.* v. *Ritter's Cafe, et al.*, 315 U. S. 722, 724–725), and particularly under the Act (*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 192–194). It has said that the Board is "charged in the public interest" with the duty of giving effect to the policies of the Act. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 165–166; the *J. I. Case* decision, *supra*, 321 U. S. at p. 337. It goes without saying that effectuation of the statute's policies may require some restriction upon the absolute freedom of action of employees and their representatives.[11]

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condemned a union's practice of unduly favoring senior members over juniors in the matter of employment privileges, as a "perversion, an embezzlement of power" and "opposed to the public interests."

[11] The National War Labor Board has established a "policy of denying maintenance-of-membership [contracts] when the union is undemocratic and irresponsible," and regularly considers "evidence of union responsibility or irresponsibility [and] *evidence of democratic control and procedure within the union or absence of such control and procedure* * * *" in determining whether to grant a union a maintenance-of-membership contract. *In re Humble Oil and Refining Co.*,

The necessity of applying the above-discussed principles to cases arising under the Act is demonstrated by the case at bar. The minority group of employees herein can be denied employment under the closed-shop agreement only in contravention of the principles of the Act and of public policy." If, under Section 9 (a) a representative chosen by the majority of the employees in a bargaining unit is bound "to practice genuine collective bargaining" in order to be the "exclusive representative of all the employees" in the unit

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15 W. L. R. 380, 387, 389-390 (italics supplied); *In re S. A. Woods Machine Co.*, 2 W. L. R. 459, 462; *In re Los Angeles Steel Casting Co.*, 4 W. L. R. 214, 219; *In re Pullman Standard Car Manufacturing Co.*, 10 W. L. R. 400, 403. See *In re Tennessee Coal, Iron and R. R. Co.*, 15 W. L. R. 15, 17–18, where the Regional Board (Region IV) refused to grant a maintenance-of-membership contract because the union's constitution and bylaws contained "no safeguard against the union's expelling a member unfairly and thus bringing about the loss of his job." See the statement of Mr. Harry Shulman, as umpire, in *In re Arbitration between Ford Motor Company and UAW (CIO)*, 14 L. R. R. 219, 220, 224, that "the prerogative of social clubs to be exclusive in the selection of their membership is not transferable to unions of working men" (Appendix C, p. 51, *infra*).

"To carry out the political analogy (*supra*, pp. 49–50): the C. I. O. adherents, having lost the election, were not only disenfranchised, but were, in effect, deported. See Lusky, *Minority Rights and the Public Interest*, 52 Yale Law Jour. 1–41 (Dec., 1942), for a discussion of minority rights as related to the public interest, with reference to the public interest in labor relations matters at p. 19. See also Note, *Effect of a Closed-shop Contract on Employer Practices Otherwise Unfair under the National Labor Relations Act*, 56 Har. Law Rev. 613, 618–619, 623 (Jan., 1943).

(S. Rep., pp. 13–14), it follows that a representative which enjoys the privileges of a closed-shop agreement must do so. Indeed, because of the very nature of a closed-shop agreement with respect to both the power it places at the disposal of the contracting union and the disastrous effect upon individual or minority employees against whom an abuse of such agreements might operate, it would seem that the test of whether a representative is satisfying the requirements of Section 9 (a) should be applied more strictly in the latter case than in the former. While the Board has never invalidated a contract between an employer and a majority representative of his employees in the absence of a finding of unfair labor practices committed by the employer, it nevertheless has indicated an awareness that labor organizations enjoying the privileges of exclusive representation under Section 9 (a) incur complementary obligations and that a failure of the representative to discharge those obligations might result in either the invalidation of its bargaining agreement or in the loss of its status as exclusive representative under the Act.[7] If a bargaining

[7] In *Matter of Bethlehem-Alameda Shipyard, Inc. and Bethlehem Steel Company, Shipbuilding Division, Alameda Yard*, 53 N. L. R. B. 999, 1016, a representation proceeding not involving unfair labor practices, the Board, without deciding the question, declared: "We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit com-

agreement, otherwise valid, may be abrogated because the contracting union is not deporting itself in accordance with the requirements of the Act, it necessarily follows that where, as here, both the employer and the contracting union fail to observe the statutory requirements in executing a

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posed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8 (3) of the Act of such a contract would be open to serious question." In another representation proceeding, *Matter of Larus & Brother Company, Inc.*, 5–R–1413, 5–R–1437, the Board, on April 7, 1944, issued a rule to show cause why it should not rescind its certification of a union which allegedly refused to admit to membership and to bargain for Negro employees, who constituted a minority in the bargaining unit composed of both Negro and white employees. The Board has since directed a further hearing in the matter. And in *Matter of Monsieur Henri Wines, Ltd.*, (*supra*, p. 41), the Board, declaring a closed-shop contract invalid, found that the contracting union, by using its contract "as a device to legalize its fraud," had *"repudiated its representative status"* and that the agreement was not "the culmination of bona fide collective bargaining between an employer and a labor organization acting as the exclusive representative of his employees, within the meaning of Section 9 (a) * * *" (44 N. L. R. B. at pp. 1318–1319, italics supplied). In the latter case, as in the instant case, however, the Board found that the employer had committed unfair labor practices. See also *Matter of U. S. Bedding Company*, 52 N. L. R. B. 382, 388.

closed-shop agreement the Board may find the agreement invalid.

B. PETITIONER VIOLATED SECTION 8 (3) OF THE ACT IN EXECUTING THE CLOSED-SHOP AGREEMENT AND IN DISCHARGING EMPLOYEES PURSUANT THERETO

For the reasons set forth above the closed-shop proviso in Section 8 (3) does not protect an agreement designed to discriminate against members of the bargaining unit who are willing to join the majority organization. Accordingly, we submit that the Board properly held that petitioner violated Section 8 (3) of the Act in executing the closed-shop agreement with the knowledge that the Independent intended to use it, contrary to the purposes of the statute, in order to deprive employees of their jobs because of their previous adherence to the Union. It follows, of course, that the discharge of employees pursuant to the terms of the illegal agreement was discriminatory and in violation of Section 8 (3). *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; cf. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81.

Petitioner's contention that it was compelled to enter into a closed-shop contract with the Independent by reason of the settlement agreement which provided that petitioner would execute a closed-shop contract with whichever union won the election (*supra*, p. 9) is without merit. The set-

tlement agreement provided for a closed-shop in the customary sense, and not as a means of securing the discharge of members of the minority union. Furthermore, as was pointed out by the Board (R. 22, 23) and by the court below (R. 349–350), regardless of the validity of the settlement agreement, petitioner cannot say that performance of its terms required petitioner to violate the Act.[46] It is thoroughly settled that private parties cannot by contract "make permissible a course of conduct forbidden by law" (*United States* v. *City and County of San Francisco*, 310 U. S. 16, 28), and that even where an agreement is valid when made, an intervening "change of fact or of law" may render further performance illegal.[47]

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[46] *Restatement of the Law of Contracts*, Vol. II, Sec. 608. See also 6 Williston on Contracts (Rev. Ed.) Sec. 1759: "* * * where the contract was originally legal, but because of a change in purpose of the parties, or a change in the law, performance of the acts contracted for on one side or the other has become illegal, any subsequent performance of such acts is against public policy and the party who has undertaken to perform them is excused from so doing * * *."

[47] In *Omnia Co.* v. *United States*, 261 U. S. 502, 512, the Court quoted with approval the following language from *In re Shipton, Anderson & Co.*, (1915) 3 K. B. 676, 683–684: "If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy." In *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308, the Court observed that "Contracts,

Similarly, petitioner's protestations of good faith in executing the closed-shop agreement, even if credited, do not alter the fact that its conduct was illegal. It is settled that an employer's motive and intent are not determinative of the question whether his conduct is in violation of the Act. As the Sixth Circuit has held, "where it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives," even where it is shown that the employer "has not willfully violated" the Act. *National Labor Relations Board* v. *Hudson Motor Car Company*, 128 F. (2d) 528, 532–533 (C. C. A. 6). To the same effect are: *National Labor Relations Board* v. *Gluek Brewing Co.*, decided August 7, 1944 (C. C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565;

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however express, cannot fetter the constitutional authority of the Congress. * * * Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357." See also other cases cited at 294 U. S. 306–311. In cases arising under the Act the Court has also had occasion to observe that since the Board is "charged in the public interest with the duty of preventing unfair labor practices" (*National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364), "wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337.

*American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 685 (C. C. A. 8); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 346–347 (C. C. A. 8); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); cf. *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 87 (App., D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. (2d) 919, 936 (C. C. A. 2).

## III

PETITIONER DOMINATED, INTERFERED WITH, AND SUPPORTED THE INDEPENDENT IN VIOLATION OF SECTION 8 (2) AND (1) OF THE ACT

If we are correct in concluding that petitioner had engaged in the unfair labor practices discussed in Point II, *supra*, which occurred subsequent to the settlement agreements and certification, then, as we have shown in Point I, *supra*, pp. 19–31, the Board was clearly justified in considering the entire course of petitioner's conduct, including events prior to the settlement agreements and certification. However, even if the Court should disagree with us as to the substance of Point II, we submit that the Board's order should nevertheless be affirmed in view of its finding that the Independent was dominated, interfered with, and supported in violation of Section 8 (2) and (1). That is, even if, contrary

to our argument under Point II, no independent unfair labor practices had occurred subsequent to the certification, petitioner's and the Independent's conduct with regard to the execution and effectuation of the closed-shop contract was of so questionable a character and struck so basically at the spirit of the Act as to warrant and, indeed, compel the Board, in vindication of the public interest, to examine the true character of the Independent. This, as we have seen (Point I, *supra*, pp. 31–32), was the view of the court below. Consequently, whatever the Court's conclusion as to Point II, we direct attention to the whole course of the relationship between petitioner and the Independent.

The Board's finding that petitioner dominated, interfered with, and supported the Independent in violation of Section 8 (2) and (1) of the Act (R. 24, 27) is, as the court below held (R. 348), supported by substantial evidence (*supra*, pp. 4–9). During the second week of the strike, petitioner launched the Independent to compete with the Union as a candidate for the employees' choice as their bargaining representative. The initial appearance of the Independent was under the sponsorship and guidance of Foreman Clark Gibson who delegated to his assistant, Lundy Groves, and to Groves' wife, the task of setting up the organization (*supra*, p. 6). The assistance rendered by Weese, petitioner's pay-

master and confidential secretary to Plant Manager Davis, in suggesting Thompson as adviser for the Independent (*supra*, pp. 6–7), and the participation in the formation and administration of the Independent of the "assistant foreman," Smith and Reese (*supra*, p. 7), together with the joint sponsorship by petitioner and the Independent of the anti-union back-to-work movement which was conducted coextensively with the Independent's membership drive (*supra*, pp. 8–9), unmistakably placed the print of management approval and support upon the organization. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–521; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 64, 68 (C. C. A. 2), affirmed 309 U. S. 629; *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 519, 523–525 (C. C. A. 7); *National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96–99 (C. C. A. 9).

The Board's findings that Groves, Smith, Reese, and Mrs. Weese [*] were employees identified with

[*] "The fact that Mrs. Weese, at times, attended foremen's meetings at the plant (R. 188, see also R. 260); that foremen and others occasionally turned to her for advice in the absence of Plant Manager Davis (R. 177–178) and that she

petitioner's management (R. 12, 20) are supported by substantial evidence (*supra*, pp. 6–7), as the court below held (R. 348). While petitioner officially designated Groves and Smith as "machine set-up men" and Reese as an "oiler" (*supra*, p. 7), they were, in fact, temporary or assistant foremen. They were so regarded by other employees,[49] and Plant Manager Davis admitted at the hearing that they might properly be considered temporary foremen (R. 214–216). Their selection by the Company to substitute for their respective foremen during the latter's absences plainly set them apart and clothes them with a prestige which inevitably associated them with the management in the eyes of the other employees.[50] The

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was petitioner's paymaster and the confidential secretary to Plant Manager Davis (*supra*, pp. 6–7), supports the Board's finding (R. 20) that she was "identified with management." *National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96, 98–99 (C. C. A. 9); *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 54; and cases cited in text, *infra*, p. 76.

[49] Employees who worked under them consistently referred to Groves, Smith, and Reese, as "assistant boss" or "assistant foreman" who, in the absence of the regular foreman, "would give us orders what to do" (R. 87–88, 97, 126–130, 133, 153–154). One employee testified that he had known Groves "to run the department for more than three weeks at a time" when Foreman Gibson was absent (R. 78).

[50] The fact that these temporary foremen were permitted to vote in the Board supervised election (*supra*, pp. 9–10; R. 190–191) did not preclude the Board from finding that their participation in the formation and administration of the Independent was attributable to the Company and therefore constituted unlawful support of, and interference with, the

Board was warranted in so finding (R. 12). *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–521; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 598–599; *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 934–935 (C. C. A. 2); *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. (2d) 588, 590 (C. C. A. 8); and other cases cited, *supra*, p. 75, n. 48.

SINCE PETITIONER DOMINATED, INTERFERED WITH, AND SUPPORTED THE INDEPENDENT IN VIOLATION OF SECTION 8 (2) OF THE ACT, THE CLOSED-SHOP AGREEMENT WAS INVALID

To be valid under the proviso to Section 8 (3) of the Act, a closed-shop agreement must be made with a labor organization which (a) is "not established, maintained, or assisted, by any" unfair labor practices, and (b) "is the representative of

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Independent. The right of foremen and other supervisory employees under the Act to become members of a labor organization does not include the right to coerce subordinate employees, either by soliciting members or by otherwise engaging in active leadership in the organization. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469, 472 (C. C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 671 (C. C. A. 8); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 682 (C. C. A. 8); *National Labor Relations Board* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9).

the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."[51] Where either of these requirements is not satisfied, a closed-shop agreement is unlawful. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75, 81.

In the instant case the Board found that the closed-shop agreement between petitioner and the Independent failed to meet the requirements of the proviso to Section 8 (3) of the Act in that (a) petitioner had dominated, interfered with, and supported the Independent in violation of Section 8 (2) (R. 24, 27), and (b) petitioner entered into the agreement with the knowledge that the Independent intended to refuse membership to employees for the reason that they had previously engaged in activities in behalf of the Union (R. 21, 23, 24). If the Court affirms, as did the court below (R. 348), the Board's finding that petitioner violated Section 8 (2) of the Act in its relations with the Independent, it is clear on the face of the statute (Section 8 (3)) that the closed-shop agreement was illegal *ab initio* and could not be a valid basis for discharging employees because of their failure to become members

[51] No question as to the appropriateness of the bargaining unit is present in the instant case.

of the Independent, regardless of the reason for their non-membership. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75. In these circumstances, the Board could properly require petitioner to cease giving effect to the unlawful closed-shop agreement and to restore to their *status quo* the employees discriminated against by reason of the agreement. The *Electric Vacuum Cleaner* and *International Ass'n of Machinists* cases (*supra*).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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NOVEMBER 1944.

# APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

## FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. * * *

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment

of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees

the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony

taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any cir-

cuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

# APPENDIX B

## STATEMENTS OF ECONOMISTS AND EXPERTS IN THE FIELD OF LABOR RELATIONS WITH RESPECT TO THE PURPOSE AND FUNCTION OF THE CLOSED SHOP.

[Arranged in Chronological Order]

Moffett, E. H. *The "Open" Shop*, The American Federationist, March, 1904, p. 214:

> The object of the union shop is not to create a monopoly of opportunity. *It is not a "closed shop."* It is wide open to any working man who is willing to help maintain the superior conditions that attract him.

Darrow, Clarence S. *The Open Shop*, Social Economic Series, Vol. 1, No. 2, Hammersmark Publishing Co., Chicago (1904), quoted in Golden, Clinton S., and Ruttenberg, Harold J., *Dynamics of Industrial Democracy*, Harper & Bros. (1942), pp. 201–202:

> The reason why a union workman does not choose to work with a non-union workman is plain and evident and founded in the protection of himself and his fellow craftsmen * * *. Instinctively men love the company of others of their kind * * *. The man who desires the society of his companions must so conduct himself that his associates are content to live with him. If he sees fit voluntarily to so arrange his life that his fellows do not desire his company he must accept the consequences, however, unreasonable society

may by. Whether the boycott is just or unjust, equitable or inequitable, has no bearing on the case. In this world men are not crucified because they are good or bad, but because they are unlike their fellows. Trade unionists for centuries have believed that they are upholding the right of man, the welfare of their class; that without their organization their liberty and independence would be lost; they have come to regard the non-union man as one who not only refuses to stand with them, but who is unloyal to his class, a traitor to his kind. They look on him as a man who seeks to undermine and destroy his fellow workman, and from the nature of things there is a great gulf between them and him. This is not a fact in trade unionism; it is a fact in human nature, and is as deep as the right of self-defense. For in the last analysis, it is self-defense.

The employing class has exactly the same feeling toward one of its members who gives his influence and strength on the side of the union workman, and who refuses to stand with them in their opposition to the demands of labor, that the trade unionist has toward the one he calls a scab. Neither is loyal to his class. Both pay the penalty of their disloyalty to their class; they are cut off from the friendship and association with others of their kind.

Gompers, Samuel. "*The Union Shop is Right*," American Federationist, April 1905, p. 221:

We assert that the union shop does not deny employment to the nonunionist, but we insist that, like all others in society, persons who are desirous of becoming beneficiaries of an agreement should become parties to that agreement and that they should

bear the equal responsibility which such an agreement involves * * *

Stockton, Frank T. *The Closed Shop in American Trade Unions*, Baltimore (1911), pp. 130, 162, 176.

* * * Finally, when enough members have been obtained to promise a successful issue, the union suddenly reveals to the employer the fact that many of his men are unionists and demands that he make the shop a closed one. If he complies, the non-unionists are given the alternative of joining the union or seeking other jobs (p. 130).

* * * * * *

An argument for the closed shop of which much has been made is that it increases trade-union membership. Experience has shown that there are always a large number of workmen "in and out of the union." They are "in the union" when they obtain a job in a closed shop; they are "out of the union" when they work in a shop where a union card is not necessary. It has been said that "the mere closing of one door to the non-unionist is the best argument to him for application."[2] Instances of marvelous growth in membership following the introduction of the card system have also been frequently reported (p. 162).

* * * * * *

In reply the unions have answered that it is not their purpose to establish a labor monopoly through the closed shop, that on the contrary it is the purpose of every union 'to get every man following or engaged at

[2] Bookbinders, Official Proceedings of the Sixth Annual Convention, 1898, p. 21.

a business to affiliate himself.[1] To this end vigorous campaigns for members are conducted among non-unionists, and 'hundreds of missionaries are at work, in and out of season, urging and pleading with them to enter the wide-open doors of the union.'[2] Furthermore, it is said that even if it is true that ninety per cent of the wage earners in America are non-union, the great majority of non-unionists are 'in occupations in which there are no unions at all, or in which the unions are too weak to think of challenging a contest over the employment of workers outside their organizations.'[3]

Here again it seems to the writer that many of the critics of the closed shop have identified it with the closed union. If non-union men have no difficulty in obtaining union membership, it is hard to see how the closed shop can be condemned as a "criminally selfish" device. Only when a union declares that it will not work with non-members and then refuses to admit the latter to membership can monopolistic motives properly be charged.[4] Closed unions, however, are rarely found at present except

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[1] Operative Plasterers' Proceedings of the Eighteenth Convention, 1904, p. 45.

[2] American Federation of Labor, Report of Proceedings of the Twenty-third Convention, 1903, p. 20, President's Report.

[3] Iron Molders' Journal, June 1904, p. 423.

[4] "If a union is working not for the interest of all the men at the trade but of members who at the time are actually in the union, if it is unduly restrictive * * * then its refusal to work with nonunion men is monopolistic and such a union should not be put up on a par with unions that refuse to work with non-unionists in the general interest of the trade." (Mitchell, p. 283.)

in decaying trades. The closed shop is ordinarily intended not to restrict membership but to increase it, as has already been shown* (p. 176).

Carlton Frank T. *The History And Problems of Organized Labor,* Boston (1911), pp. 126–128:

The two arguments in favor of the closed shop are, "sentimental" and economic. According to the first method of justifying the closed shop, wages have been raised and conditions of labor within a given trade improved as the result of the efforts and the sacrifices of the members of labor organizations. All workers in a trade are benefited; and "he who is benefited should bear his share of the expenses of the benefactor." The man who refuses to join the union and bear his share of the expenses necessary to the success of the union's policies is a parasite and deserves to be excluded from employment. Through the efforts of labor organizations unionists expect not only to help themselves, but indirectly to aid all wage earners. Viewed through these spectacles, the non-unionist or "scab" strikes a blow at the hearthstone of every worker in the land when he refuses to conform to the program of the union. At best, the "scab" is an extremely short-sighted man, and one who must not be allowed to ruthlessly take away such advantages as have been gained by labor organizations. The following quotation well illustrates the union point of view. "To the non-unionist, despite that which his advocates say for him, cannot be attributed the virtue of helping his fellow workmen or contributing toward the establishment

* See above, p. 162, *et seq.*

of more rightful relations between workingmen and their employers. No force but that of persuasion and moral and intelligent influences should be exercised to convert the non-unionist to membership in our organization, but it is hurtful from every viewpoint, and to every enlightened interest, to advocate the "open shop."[1]

The economic necessity for the closed shop depends in a large measure upon the attitude of the employer. If the employer insists upon his right to make individual bargains with non-union employees, and discriminates against union men, or hires non-union men at a lower wage than that paid union men, the union will sooner or later be obliged to fight or be disintegrated. The hostile employer, unless restrained by the closed shop or by a uniform system of wage payment for all workers coupled with a system of apprenticeship and of promotion, can deunionize his shop unless the union includes practically all the workers available in that trade or industry. The Union facing a hostile employer anxious to reduce wages and to lengthen the working day, and in touch with a supply of non-union workers, is forced, unless it gives up all hope of efficient trade-union action, to adopt the closed shop policy. Under such conditions the closed shop means more bread and butter, more leisure, and better treatment for the wage-earner.

Bryan, W. E. (General Pres. United Brotherhood of Leather Workers). *"Open" and*

[1] *American Federationist*, November 1903, p. 1196.

*"Closed" Shops,* American Federationist, April 1912, p. 324:

> The closed or union shop, as advocated by trade unions, is founded on justice and equity to all men. The church is a closed shop inasmuch as it requires its members to subscribe to its precepts and practice its principles. The trade union asks no more than the church in its requirements, and its doors are open to all men that are willing to accept its principles and subscribe to its purpose.

Commons, John R. and Andrews, John B. *Principles of Labor Legislation,* New York (1936), p. 391:

> d. *Closed-shop Strikes.*—A closed shop means that the employer agrees to employ only union members. Unions justify their demand for a closed shop on two grounds: (1) They allege that only workers who support the union financially and otherwise are entitled to the benefits which it secures. (2) They insist that if the shop remains open to non-unionists collective bargaining will be endangered. For the union will be seriously weakened, both because workers will not feel the need of retaining membership, and, perhaps more important, because the employer will be able imperceptibly to discriminate in favor of non-unionists, and thus eventually be able with impunity to break the collective agreement or refuse to renew it. In order, then, to maintain the wages and hours won through union effort, many unions seek to achieve the closed shop.

Gompers, Samuel. *The Union Shop And Its Antithesis* (pamphlet). July 1920. Quoted

in Beman, Lamar, T., *The Closed Shop.* New York, 1922, p. 49:

> A non-union man who accepts employment in a union shop has the privilege of joining the union which has a voice in determining with employers the wages, hours and conditions of work. He is given time in which to make application, if he so desires.

Lord, James (Pres. Mining Dept. A. F. of L.). *The "Open Shop,"* American Federationist, January 1921, pp. 49–50:

> The union shop is the real "open shop." It is open to all workers, in every trade and industry, who desire to join and lend their efforts to an intelligent solution of their affairs. No matter what their past attitude has been, * * * the past is wiped out that minute they exhibit a desire to carry their share of the burden and costs of their own movement, as well as share in its achievements and blessings.

Catlin, Warren B. *The Labor Problem,* New York (1926), p. 344:

> The unions themselves look to complete organization and the maintenance of a union-shop as the best guarantee that prompt readjustment to new conditions will be made, standards preserved, and agreements kept inviolate. They ask for this measure of control in order that they may enforce discipline. Here the issue is clearly joined with that large group of employers * * * who, while professing no desire to discriminate against union men—might, in fact, hire one occasionally if they could not find anyone else—declare for the "open shop" and the right of the employer to hire

whom he pleases, regardless of whether or not he belongs to any union or association. The demand for the union shop—that only members of the union shall be employed or that non-union men who are employed shall be required to join the union within a reasonable time—is chiefly a result of the uncertain, partially recognized, probationary status of the union that still prevails in many industries. * * *

Cummins, E. E. *The Labor Problem in the United States,* New York (1932), p. 231:

To trade unionists the closed shop seems in most instances an obviously necessary device for the protection of their interests through union control of working conditions; that is to say, it is one means and an important one of enforcing the general policy of standardization. * * * The union also insists that the closed shop holds many advantages for the employer: In demanding the "check-off" system, the anthracite section of the United Mine Workers' Union made use of this argument—a fight for the check-off being, of course, practically equivalent to a fight for the closed shop. "Outlaw" strikes occurred in spite of trade agreements, and the union contended that with the check-off it could keep its members under control.

Tead, Ordway and Metcalf, Henry C. *Labor Relations Under The Recovery Act,* New York and London (1933), p. 172:

10. Union demands culminate in a stand for the "closed shop." This restricts the freedom of any worker who does not join and hence is "un-American." It is true that unionism in order to fulfill its purpose—indeed, in order to be sure of its

survival—logically implies that the shop which is operating under a collective agreement shall at least *give preference* in employment to union workers. Otherwise the union members employed would be gradually superseded and the collective agreement would no longer have binding effect on the new workers in their dealings with the company. If the union is to be responsible in any degree for upholding its end of an agreement, *it must have assurances that the great majority of employees are and will continue to be its members.*

Perlman, Selig and Taft, Philip. *History of Labor in the United States, 1896–1932*, New York (1935), vol. IV, p. 9:

10. The new leaders of the American Labor movement were even more conscious of the immigrant problem than the Knights of Labor, which had pioneered the first legislation to restrict free immigration. They had learned that to workers employed in a given industry, a new wave of immigrants, generally of a new nationality, meant a competitive menace to be fought off and to be kept out of the industry. The emphasis on the closed shop had among other objectives that of preventing the employer from preparing for a future showdown with the union by attaching to himself immigrant employees, who, due to the social and cultural gulf between themselves and the unionized American fellow employees, could be influenced to align themselves with the employer. With all that, the leaders of the Federation, many of them former immigrants, knew that once the natural leaders in an immigrant group had been reached by the gospel of unionism, the immigrant, instead of continuing a liability, became an

asset. Whether the immigrant was treated as a potential asset or an immediate danger depended on circumstances and on the idealism of a particular leader."

Daugherty, Carroll R. *Labor Problems in American Industry*, Houghton Mifflin Company (1936), pp. 557, 558:

(3) The *closed union shop with open union* is the "milder" form of the closed union shop. Employers are supposed to hire union men, but if these are not available, non-union workers may be employed with the express provision that they must join the union as soon as they enter the shop. Only union men are on the jobs in the plant, but union membership is easy to get. Unions advocating this plan claim that the organization can best be saved from the undercutting competition of non-unionists by bringing the latter into the fold, since there is no way to drive them out of the industry. This argument seems largely borne out by the experience of the United Mine Workers in the bituminous-coal fields and of the clothing industry in New York City. The closed shop with open union is thus found mainly in highly competitive and seasonally unstable industries. * * * (p. 557).

The bases of collective bargaining, it has been shown, are the curtailment of competition among individual wage-earners and the observance of uniform employment standards without change over a period of time. The realization of this program is plainly dependent upon the ability of a union to control at least a majority of the workers in its craft or industry. If non-unionists are permitted to labor without regulation, they will accept job terms below the minimum standards demanded by the

union. Most employers will hire them instead of union men, so that the latter will fail to get work unless they too accept poorer conditions. All solidarity will thus ebb away and the organization will in the end be broken up. Recognition of the union, the very existence of the union, depends in many cases on shop control as a part of the main aim of job control. This is particularly true under American conditions. Employers in this country often deal with unions, not because they prefer to, but because they are compelled to by force of circumstances. Many of them would be glad to return to conditions of individual bargaining. Certain exceptions exist, as in the cases of individual railroads, but in most industries eternal vigilance is for unions the price of recognition. The competition of different groups of substandard workers, extremely menacing where skill has been broken down by the use of machines, is unusually keen in the United States. The closed union shop is a reaction to all these conditions. In England one seldom hears of it because organized labor is relatively secure; employers there have for a long time accepted unions as spokesmen for their workers, and recognition is not an issue. Immigration is almost non-existent and the introduction of machinery is not considered an excuse for substituting non-unionists for displaced unionists (p. 558).

Clark, Marjorie R. and Simon, S. Fanny. *The Labor Movement in America*, New York (1938), p. 32:

A closed shop agreement is valuable to the unions primarily because it prevents an

employer from weakening and sometimes destroying the union by gradual replacement of union with non-union workers. To an employer the closed shop agreement is often desirable as it places full responsibility for supplying qualified workers upon the union.

National Industrial Conference Board, Inc., Studies in Personnel Policy, No. 12, *The Closed Shop*, New York (1939), p. 7:

> The case for the closed shop from the management angle is best summed up by the president of a company employing nearly 2,000 workers:
> There is little doubt in our minds that a closed shop reduces or eliminates strained relations among groups of employees, intra-plant hatred and strife, which are very detrimental to management and earnings.
>
> * * * * * * *
>
> Centralized responsible leadership in a national and experienced union has resulted in improved discipline, higher efficiency, and spirit of co-operation. The union undoubtedly appreciated receiving the closed shop and has encouraged a spirit of interest in the success of our business. The union is able to insure uninterrupted operations—our contract calls for no strikes—and it can handle men who would otherwise be chronic trouble-makers. Collective bargaining is more orderly since we are dealing with only one group, with which we can deal at arm's length.

Brooks, Robert R. R. *Unions of Their Own Choosing*, New Haven (1939), pp. 185–187:

> The distinction between a closed shop and a *closed union* should be made clear:

A closed-shop agreement simply requires that all workers hired by the employer shall join the union at the time of hiring or within a stated period afterward. It leaves the choice of workers up to the employer. He can hire whomever he pleases and fire whomever he pleases, as far as a closed-shop agreement is concerned. The closed shop does not create a monopoly of the labor supply by the union since the employer can expand or contract his labor force at will. The closed shop is not itself a hardship on the employer, except to the extent that it increases the union's bargaining power. The chief effect of the closed shop is upon the minority of workers who are unwilling to join the union.

When the closed shop is combined with a closed union, however, a tight monopoly is created which may injure the employer, nonunion workers, and consumers. That is, if the union seriously restricts membership, the effect upon costs of production, prices, sales, and employment is indistinguishable from the effect of any other monopoly—a small minority gains at the expense of the great majority.

The demand for the closed shop rests upon two motives: the desire to prevent a minority of nonunion "chiselers" from securing, free of charge, the advantages for which the union members have paid; and a desire to prevent the employer from defeating the union by gradually transforming a nonunion minority into an antiunion majority.

The first motive is understandable enough to anyone who has ever taken part in group activity. The majority, especially if it is a large majority, almost always feels that the minority ought to pay "its share of the

freight." Even individualistic employers sometimes agree with this point of view. (p. 185–186)

* * * * *

More often, however, the employer takes the position that he will close down his plant before he will permit a minority of his men to be coerced by a majority. In these cases, the union frequently persists in its demand because of a strong suspicion that the real intention of the employer is to get rid of the union altogether as soon as possible. At this point the conflict tends to arrange itself around two unreal symbols: the "closed" shop *vs.* the "open" shop.

Neither side means exactly what it says. The union may be content with less than a closed shop if it can be assured of a secure position. In demanding an "open" shop the employer frequently wants so large a proportion of non-union men that the union is powerless as a bargaining agent. This is perfectly apparent when the "open shop" is accompanied by the other antiunion policies of employers who make the greatest stir over the closed-shop issue. The real matter at stake is not the open *vs.* the closed shop, but unionism *vs.* antiunionism. (p. 187).

Cooke, Morris Llewellyn and Murray, Philip: *Organized Labor & Production*, New York (1940), pp. 47–48:

There is therefore a strong motive for union members and leaders to seek a closed shop contract. Under such a contract workers are required to join the union at the time of employment or within a stated period afterward. If employment is slack, this may mean that only workers on the

union's membership and seniority lists will be employed. The traditional reasons for union insistence upon a closed shop contract are, first, to prevent an anti-union employer from whittling away the union's strength by gradually replacing union members with non-union workers and, second; to compel all workers receiving the benefit of union activities to pay their share of the freight. * * * For some time to come, therefore, the closed shop is likely to be insisted upon as an important tool for preserving collective action among organized workers.

There is a third reason, compelling to union and employer alike, for the closed or union ship. Under a "members only" or even "sole bargaining rights" contract the status of the union is insecure. It owes its continued existence to the day-to-day benefits it can confer upon its membership. There is a tendency therefore for the union to take up grievances indiscriminately and make vigorous efforts to win them all, for if it does not do so, it will lose support and membership. The short-sighted employee who has no justifiable complaint but is pressing for "action" will say, "All right, if you won't take up my case, I'll stop paying dues and get my friends to do the same." Under a closed shop contract this is impossible. The union then is in a position to take up cases on their merits alone, ignoring threats of this kind.

Lester, Richard A. *Economics of Labor*, New York (1941), p. 622:

Unionists * * * defend the closed shop on the ground that, if a majority of the employees select a certain agency to repre-

sent them, the rest should accept that majority decision and assist in paying for the benefits they receive as a group through collective bargaining and the activities of the union. This argument rests on the notion that no employee should be permitted to be a "tax dodger." Union officials also insist that 100-percent unionization is necessary if the union is to enforce its working rules, particularly national union rules that may not be embodied in local trade agreements. * * * In addition, union leaders state that they cannot be responsible for the discipline of all workers in a plant unless all of them are in the union and hence are subject to the union's discipline measures.

Labor officials have also insisted that the closed shop is necessary to prevent discrimination in favor of nonunion men, to prevent competition on the terms of employment, and to win strikes.

Daugherty, Carroll R. *Labor Problems in American Industry*, New York (1941), p. 464:

> * * * Union standards and union existence depend on the maintenance of union shops. They are furthermore undoubtedly justified in claiming that it is not fair for non-unionists to work with union men. Why should the former reap where they have not sowed, getting the benefits of union wages and standards without making sacrifices for them?

Toner, Rev. Jerome L., *The Closed Shop*, Washington (1942):

> The origin of the term "closed shop" never has been satisfactorily ascertained. According to Samuel Gompers * * * the

phrase was coined and cunningly employed by opponents of labor as a synonym for the term "union shop" because of wide public antipathy for anything "closed" and general sympathy for the freedom of opportunity popularly, but speciously, associated with the so-called "open shop." (pp. 22–23)

Trade union leaders have with good reason tried to supplant the term "closed shop" with "union shop" * * * (p. 25).

* * * Strictly interpreted, membership as "a condition of employment" might mean that the workers must be members of the union before starting to work, or more strictly still, that the employer must employ only those who are and have been members of the union, in which membership in some cases might be difficult or impossible to acquire. Interpreted liberally, the expression "union membership as a condition of employment" suggests that a "new worker must either be a member when he is hired or become a member within a specified time after commencing work with company."[44] This is the interpretation usually intended in current closed shop agreements. (p. 32–33)

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In some of the better-organized industries, "any applicant must be admitted who is not an offender against the union * * * and if any rule shall be passed that imposes unreasonable hardship, or that operates to bar desirable per-

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[44] National Industrial Conference Board, [*The Closed Shop*], p. 4; cf. National Association of Manufacturers, [*Open Shop Encyclopedia for Debaters* (New York: 1921)], p. 6.

sons, that matter may be brought before the tribunal trade board with appeal to the board of arbitration for such remedy as it may deem advisable."[78] (p. 37)

* * * * *

As for the charge that it is in the nature of the closed shop to create an air-tight labor monopoly, a recognition between the use of the principle and the abuse of related circumstances is important. The situation that produces the closed shop and the closed union in combination is one that no friend of labor will seek to justify. Unless union membership generally is open to every competent worker on terms that are non-discriminatory, reasonable, and uniform, there is little to be said in its favor. It would be mincing words to argue that the closed shop with the closed union does not impede the basic and unchallengeable privilege of the employer to hire whom he pleases and of the individual to

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[78] Amalgamated Clothing Workers of America, standard contract.

[79] The United Mine Workers of America have always permitted the coal operator to employ anyone he wished but they have insisted that anyone not a member of the union should, on employment, join up. (p. 41)

* * * * *

[80] As long as the union honestly and reasonably keeps its membership books open to those qualified and willing to join and retains a moderate initiation fee, that type of closed shop with open union is defendable, but as soon as the closed shop and closed union are united, there is little to be said for them and they are condemned by the courts and union leaders generally. The public and the press, either ignorant or misinformed, are inclined to condemn every type of closed shop agreement. (p. 42–43)

have the opportunity to join the union so that he may work in a closed shop.[110] It cannot be denied that there have been and still are some flagrant and infamous offenses against freedom of opportunity committed by labor czars and racketeers who have corrupted the principle of the closed shop for their own purposes. Their power, however, comes not from the closed shop as such, but from their methods of threat and coercion, graft and violence; their victims are not only employers but workers as well. * * * (p. 136–137)

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A related objection to the closed shop is that it makes employment contingent upon continual good standing in the union. But though that condition springs from the very nature of the closed shop principle, abuses against that principle are not intrinsic to it. Here again it would be a disservice to labor to attempt to excuse or minimize the grave injustice involved in the deprivation of employment caused to any unionist expelled or suspended without sufficient reason. (p. 140)

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Closely connected with the criticism of compulsory union membership is the charge

[110] It must not be inferred that an open union would not have the right to induce an employer to give preference to union men in hiring or that he should not agree to hire only those who are already or will become members of the union. In effect, in a period of considerable unemployment, that would be tantamount to a closed shop union, but with one significant difference—the union would have been open for workers who wish to insure their job opportunities and the employer would have waived his right to employ whom he pleases.

that "force and coercion are absolutely essential to the establishment and maintenance of the closed shop and will always be its most prominent characteristic so long as it continues to be an industrial institution." [120] As already pointed out, such an indictment may be valid when the closed shop is coupled with a closed union. When these two practices exist in combination, there is the danger that an artificial monopoly may be created. But when the closed shop operates under an open union, nonunionists will not be shut out if they are willing to join the union. The degree of force and coercion necessary to establish and maintain that type of closed shop—as a general rule the only defensible type—is automatically lessened (pp. 140–141).

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The fact is that closed shop unions are generally open to any qualified worker—as stipulated by collective agreements and by statutes. (p. 146)

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Whenever unionists are in the majority, they have the right to bargain as the exclusive agent for a contract which benefits unionist and non-unionist alike. It is generally under such conditions that a union tries to obtain the closed shop. (p. 149)

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To begin with what is probably its best-known function, the closed shop offers protection to union members. * * * a closed shop assures the union and its mem-

[120] Walter Drew, "Closed Shop Unionism," in L. T. Beman (editor) *Selected Articles on the Closed Shop* (New York 1921), p. 150.

bers of non-discrimination during the life of the agreement, for once the closed-shop contract is obtained the employer cannot hire any non-union worker except for a specified period of time. Thus the union membership will remain numerically the same even if the employer should be vindictive enough to discharge those who had been very active in promoting the cause of unionism. When he finds it necessary to maintain or increase his working force, he will be obliged to hire men who are or will become members of the union * * * the union * * * finally resorts to the seemingly drastic measure of the closed shop because it realizes, as Sidney Hillman says, that "a labor organization can be constructive and responsible only where it is strong, independent, and well-disciplined."[10] Under closed shop conditions, a union is afforded the greatest possible opportunity for developing those attributes.

Even in cases where the employer is willing to sign a non-closed shop contract, the union is forced to harbor a natural suspicion that the arrangement will not last; the apprehension that the added pressures of contractual obligations may induce the employer to hire non-union men forces the union to seek the closed shop as a means of self-preservation. (p. 149–151)

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Closely related to this aspect of the closed shop is its function in contributing to an increase in responsibility. Since under collective bargaining the wages,

[10] Hearings before the Committee on Education and Labor on *S. 1000, S. 1264, S. 1550, S. 1580, and S. 2123*, 76th Cong., 1st Sess. (1939). p. 3769.

hours, and conditions of work are negotiated and agreed upon by the employer and the union, and since the enforcement of agreements is generally left to the union, it is essential that the union have authority over all the employees to whom the contract applies. The unions contend that the degree of responsibility will be in direct proportion to its control over all employees. Therefore, in view of the nature of the relationship of the closed shop to all employees covered by the contract, the union regards it as the best method by which to carry out its obligations in the fullest measure * * * (p. 157). * * * Defenders of the closed shop point to the fact that the strongest and most responsible unions in the United States are those that have closed shop contracts or conditions that endow them with similar authority. (p. 157)

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An important aspect of the power of the closed shop to control job opportunity and tenure is the dangerous power which it vests in union leaders who do not represent the interests of the rank-and-file membership. The almost irresistible impulse to perpetuate their positions sometimes leads them to utilize constitutional devices to centralize authority in executive hands.[31] Any attempt to organize an opposition may be penalized by charges resulting in suspension or expulsion from the union, which automatically means dismissal from a closed shop job. Such strategy is carried on by a perversion of parliamentary procedure just as effective as gangster dom-

[31] Harris, [*American Labor*], p. 165; Sullivan, [*This Labor Union Racket*], p. 54.

> ination. Unless the worker is protected from this kind of abuse under the closed shop, it may prove more harmful than employer exploitation and discrimination. Not until the employee who is suspended or expelled from a union is able to go to a Labor board, Federal or State, and have his case heard will this danger, almost inherent, although infrequent, in the closed shop, be removed. (p. 166)
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> * * * the advocates of the closed shop reject the charge of monopoly.[1] They insist that because the union is open to any competent worker no one can complain of being deprived of the opportunity to work * * * *The objective of the union is,* however, to enforce closed-shop contracts, to obtain control of all possible job opportunities, and *to enroll every worker within the ranks of their respective unions* (p. 175). [Italics supplied.]

Golden, Clinton S., and Ruttenberg, Harold J. *The Dynamics of Industrial Democracy,* Harper & Brothers (1942):

> The union-shop idea is simply that union and nonunion workers in most instances cannot work alongside of each other indefinitely for practical reasons. The "yellow-dog contract," now illegal, provided that, because (1) management did not recognize labor unions, or (2) believe in or practice collective bargaining, and (3) its employees

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[1] Since the passage of the National Labor Relations Act and the outstanding decision of *Williams* v. *Quill*, 277 N. Y. 1, 12 NE (2) 547 (1939), the monopoly charge against the closed shop has lost much legal support.

were not union members, it was a condition of employment that no employee could belong to a union. Management, then, used its arbitrary powers of discharge to enforce these contracts, whether they were written or just understood, that any employee who joined the union would be fired when it was learned he had joined, or it was suspected he had joined or might join. Management's enforcement of the dictum that union and nonunion workers should not work side by side was complete. The "blacklist" was devised, this simply provided that once a worker was fired for union membership, union agitation, or suspected union membership no firm in the district, frequently in the industry, would give him employment. This policy naturally flowed from the basic opposition of management to organized labor, but it was also conceived and practiced for practical operating requirements. Associate OPM Director Sidney Hillman aptly pointed this out to the House Judiciary Committee of Congress early in 1941: A Congressman asked, "Now, my understanding of an open shop is a place where union and nonunion men work together. Is that true?"

"Oh, no, Congressman," Mr. Hillman replied, "they just work in the same place. They don't work together."[1]

Members of labor organizations favor the union shop for different but nonetheless potent practical reasons; they cannot afford to work with nonunion workers for reasons of self-preservation. Unionists do so only temporarily as a matter of expedience—until the first opportune time to bring the

[1] Pittsburgh Press, February 28, 1941, p. 2.

non-members into the union fold or replace them with union members. (pp. 200–201)

* * * * * *

The self-defense policy of union workers is, "If we don't hang together, we will each hang separately." As management finds it essential to self-defense to "coerce" those who may stray from an antiunion-shop policy, so, likewise, do union workers find it essential to self-defense to "coerce" nonunion workers into the union fold. In arguing the union shop with a management official who is prominent in high society circles in Pittsburgh, one of the authors remarked, "Whether or not you grant the union shop, union members will continue to exert social pressure on nonmembers to get them into the union." He laughed; the idea that workers might exert social pressure against members of their group who failed to conform to the group's attitudes seemed ridiculous to him. In his own group, of course, social pressures are rigidly exerted—a daughter who married the chauffeur just has to move across the railroad tracks with him. That a non-union worker might have to drink his beer at home instead of at a bar frequented by union workers, to this man of high society, was laughable. Maybe he thought workers exert social pressure only with their fists as he was laughing at the idea of calling a street brawl "social pressure." More likely, however, he felt social pressures were subtle practices that his group in society engaged in exclusively, when actually, of course, they are a vital part of the habits of every social group.

But there is a significant difference in the way in which management and union

members exercise their respective policies of self-defense. A small minority of industrial leaders—only a very small percentage of the manufacturing establishments in America, for instance, belong to the National Association of Manufacturers—formulate the basic policies affecting union-management relations, and "coerce" the vast majority of industrial firms to abide by them. Union members, on the other hand, exercise their self-defense policies within the framework of democratic principles. They do not seek to "coerce" with the penalty of discharge any worker into union membership in a given bargaining unit until a majority of eligible workers have voluntarily become union members. Then a majority—in accordance with the democratic principle of majority rule—seek the right through the union shop to "coerce" a minority of their fellow workers into union membership at the penalty of discharge.

The philosophy of the union shop, therefore, is rooted in the basic democratic principle that governs our political life; namely, the rule of the majority. The only thing that is revolutionary—to management—about the underlying principle of the union shop is that it should be fully accepted in our industrial and economic life as well as our political life (pp. 203–205).

* * * * * *

It is practical for only one union to represent any given group of workers. The minority nonmembers cannot express their views or exert their influence through another union, because neither the law nor management recognizes a minority union.

All workers in a given unit have to be represented by one bargaining agency. Thus the only way the minority workers can express their views and exert their influence is through union membership. They are bound by the action of the majority in any event, and to have a voice in making the decisions of the majority the minority or nonunion workers have to join the union. In cases where SWOC local unions lose an election conducted by the National Labor Relations Board, we usually advise our members to join the victorious union to protect their interests. This does not necessarily deny them their particular views which led them originally to choose SWOC in preference to the victorious union. Within its councils they can express their views and, as frequently happens, after an interval of time they persuade a majority of their fellow unionists to change their local union affiliation to SWOC. But to secure a voice in industry the minority must join the majority union. Membership in the union as a condition of employment, therefore, is an essential requirement of industrial democracy in order to assure all workers a voice in the determination of their conditions of employment.

Police powers or disciplinary powers are vested in the union in direct proportion with the amount of responsibilities it assumes. The union assumes the responsibility to see that no stoppages of work occur, that all workers adhere to the contract machinery to settle grievances peacefully, and that wages and other vital cost factors are pegged generally for the life of the contract. To fulfill these responsibilities the union must have sufficient authority to discipline

those workers who, for example, may stop work in violation of the contract. Because supreme power is divided between management and the union, the majority-rule principle operates differently from the way it does in a political democracy—where supreme power is vested in one agency, the government. Here, if the Republicans are elected, Democrats do not have to join the Republican party, because the state or government has the supreme power to enforce the laws passed by the Republicans. But it is necessary for the minority nonmembers to join the union or else the majority, through the union, lacks the power to see that the minority abides by the rules. For example, nine hundred of a thousand workers vote for SWOC. The one hundred that vote against it refuse to join. If they stop work the entire one thousand workers are affected. Management holds the union responsible for enforcing the contract; but it cannot discipline nonmembers, since its authority is confined to members. Thus in order to discharge its responsibilities for the maintenance of industrial peace the minority workers must be required to join the union at the penalty of discharge.

Lastly, it is a basic principle of industrial democracy that those who share its benefits must assume the responsibility of securing them. This principle has its counterpart in a political democracy; namely, those who enjoy its freedom must assume the responsibilities of it. The city taxpayer, for instance, who votes against the victorious candidate for mayor, whose program advocates increased taxes to build a new city hospital, must pay the additional taxes to erect the hospital. Failure on his part to pay such

taxes, if persisted in, results in the recalcitrant taxpayer losing his property. All the employees in a given bargaining unit, as we have seen, are bound by the collective bargaining contract. The wage increases, shorter hours, and other benefits secured by the majority in the contract are enjoyed likewise by the minority. The union has to pay hall rent, postage, grievance committeemen for lost time, and other operating expenses. To meet these obligations every member must pay the taxes (union dues) levied by and for the support of the union. All the workers in a given unit derive equal benefits from the union and, therefore, they should all share equally in paying the cost of its upkeep. This is possible only through union membership, because the union cannot collect dues from workers for whom it bargains but who, in turn, are not members of it. Union members also, on occasion, have to strike to win gains. This often means that the union has to assess its members to win the strike. The benefits of the victory are shared in equally by the minority nonmembers. Consequently, it is a requirement of industrial democracy that all of its beneficiaries assume their share of the burdens (pp. 211–213).

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We cannot afford to trust implicitly a management that adamantly refuses to concede the union shop after our local union (or unions) in its plant (or plants) has enrolled a majority of eligible workers on a voluntary basis. Nor can other labor leaders, except at the peril of their union's life. A management that withholds from the union full and complete recognition puts the latter

on the defensive, compels it constantly to be prepared for an eventual strike for its very existence (p. 227).

Padway, Joseph A., "The Closed Shop Is Upheld." *The American Federationist* (December 1943), vol. 50, no. 12, pp. 12–13:

> It is ridiculous to say that anyone is deprived of his right to work by the union shop. When simply by joining with his fellow workers in assuming the responsibilities of collective bargaining instead of seeking a free ride, he can obtain the desired employment.

## APPENDIX C

Mr. Harry Shulman, as umpire under a contract between the Ford Motor Company and the United Automobile, Aircraft & Agricultural Implement Workers of America (CIO), has recently observed (In re *Arbitration between Ford Motor Company and U. A. W.* (CIO), case No. 209, decided March 29, 1944, 14 L. R. R. 219, 220–221):

> The relationship of a union member to his union is a matter of extreme importance in our economic organization. A union is not a social club or college fraternity where men seek congenial company for leisure time. It is an organization which transcends differences in religious faith, political affiliation, racial origin, educational background, or social manners. More and more, union membership has become a condition of earning a livelihood. Many workers would find it impossible to obtain employment and to provide food and shelter for themselves and their families if they did not belong to a union. The prerogative of social clubs to be exclusive in the selection of their membership is not transferable to unions of working men. The growth of industrial unions like the UAW (CIO) illustrates the emphasis on general inclusion. * * *
>
> The primary and historic purpose of labor unions is, of course, to increase the workers' bargaining power and to protect them in their relations with their employers. But since unions, too, are managed

by fallible and mortal human beings, there is need, at the same time, to safeguard the workers' interests in his relation to the union. This is increasingly true as unions grow in power and importance. The discharge of a worker by an employer leaves him free to take a job with some other employer. But the expulsion of a worker from membership in a union may disable him from finding any work in the community or industry.

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